93-860

No. 93-

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IN THE

Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; CHARLES JARDON AND TONY K. JARDON, INDIVIDUALLY AND AS NEXT FRIEND OF CHARLES JARDON, JR.; ROBIN JARDON, WARREN JARDON AND SHARON JARDON; SHIRLEY ZALEWASKI, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF YEN ZALEWASKI, DECEASED; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BOBBY JOE INMAN, DECEASED; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES D. PARRY, SR., DECEASED; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMCAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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112 PP

QUESTIONS PRESENTED

This case was brought under Texas law and filed in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants, and could not have been brought originally in federal court. It nonetheless was removed and transferred to a New York federal court for disposition. The judgment below presents the following questions:

1. Whether federal district judges may circumvent the limitations Congress wrote into its seven removal statutes, as the Second Circuit held below, simply by invoking the All Writs Act "to remove an otherwise unremovable state court case," in the discretion of the judge, "when the need arises."

2. Whether, as the Second Circuit held below, already injured named plaintiffs in Rule 23(b)(3) class actions are free, despite the Due Process Clause, to negotiate away the unaccrued future legal claims of absent persons without any notice, without any right to opt out, and without separate class representation, on the ground that such protections are not essential for "unknown plaintiffs," because "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In addition to petitioners, the following persons appeared as plaintiffs-appellants in the Second Circuit below:

VERDA WILSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ISAIAH WILSON, JR., DECEASED;

EARL THOMPSON; JUDY L. THOMPSON;

PEGGY SANDS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MARTIN SANDS, DECEASED;

EMILE ANNIBOLLI;

LAURA JENKINS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF EDDIE JENKINS, DECEASED; RONALD L. HARTMAN, KATHERINA H. HARTMAN, AND AS NEXT FRIEND TO JEFFERY ALAN HARTMAN AND ANGELA MARIE HARTMAN, BOTH MINORS INDIVIDUALLY AND AS REPRESENTATIVE OF THOSE SIMILARLY SITUATED.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which affirmed both the district court's refusal to remand the case to state court and its dismissal of petitioners' claims, is reported at 996 F.2d 1425, and is reprinted as Appendix A, at **A1**. (Page references to the appendices bound with this Petition are styled "**A__**"). The decision and order of the United States District Court for the Eastern District of New York, 781 F. Supp. 902, and an unpublished ancillary order, from which appeal was taken are reprinted as Appendix B (**A26**) and Appendix C (**A60**), respectively.

JURISDICTION

The decision of the court of appeals issued on June 24, 1993. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 26, 1993. *See* Appendix D, at **A63**. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property, without due process of law."

28 U.S.C. § 1441 provides in relevant part:

> **§ 1441. Actions removable generally**
>
> (a) [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

The All Writs Act, codified at 28 U.S.C. § 1651(a), provides:

> **§ 1651. Writs**
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Fed. R. Civ. P. 23 is reprinted as Appendix E, at **A64**.

STATEMENT OF THE CASE

The decision below is the third in a line of cases from the Second Circuit beginning in 1988 that embraces a radical new removal doctrine — and the first squarely to present the issue to this Court. *See* note 32, *infra*. In conflict with decisions of this Court and several courts of appeals, this doctrine permits federal district judges to ignore Congress's seven precise removal provisions and to remove cases from state courts whenever they deem it necessary. In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the judge, "when the need arises." **A8-A9**.

In this extraordinary case, a total of 21 States appeared as *amici curiae* to caution the Second Circuit that the failure to reverse the district court would invite "every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." Brief *Amici Curiae* of the State of Alabama, *et al.*, at 16. The 21 States termed this radical doctrine "a breach of the walls of comity and federalism that have been erected by Congress and the Supreme Court to ensure the continued vitality of our nation's parallel state and federal judicial systems," and "an ill-advised erosion of judicial federalism." *Id.* at 16-17.

Unfortunately, this concern for judicial federalism was not heeded. Instead, the Second Circuit reaffirmed its "All Writs removal" doctrine. **A8-A9**. This Court should grant certiorari to address what the 21 States correctly described as "an illegitimate judicial amendment of Congress's removal statute." *Id.* at 18.

Even if federal removal jurisdiction somehow exists in this case, there is a further question worthy of review by this Court: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* legal claims of absent persons? The binding effect of class actions on absent persons is an important issue, as illustrated by this Court's current consideration of the issue in the context of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. This petition presents fundamental aspects of the issue not present in *Ticor Title*, which are worthy of this Court's review regardless of the disposition of that case.

1. Proceedings in Texas.

As the 21 States noted, "[t]his case involves tort claims brought under Texas law in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants." Brief *Amici Curiae* at 1. The case was filed in 1989 by petitioner Shirley Ivy and other plaintiffs in the District Court of Orange County, Texas.[1] Petitioners are Vietnam veterans and members of their families. They allege that they have suffered serious physical injuries as a result of wartime exposure to the chemical herbicide "Agent Orange."[2] As the court below acknowledged, "[t]here is no complete diversity of citizenship, and no federal issue is apparent in the complaints," **A7**, so that a state court was the only forum available to petitioners.[3] The case could not have been filed in federal court.

Nevertheless, respondents removed the case to the U.S. District Court for the Eastern District of Texas, citing two grounds for 28 U.S.C. § 1441 original jurisdiction removal, neither of which was

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[1] Petitioners brought suit on their own behalf, but also sought certification to proceed on behalf of a class of persons similarly situated. Original Petition at 16-18 (Joint Appendix ("JA"), 2d Cir. No. 92-7575, at 63-65). Although petitioners have vigorously represented the interests of the putative class since 1989, they do not assert that a class action is necessarily appropriate for other than limited pretrial purposes. The Texas courts took no action in this case prior to removal, so that all that is currently before this Court are petitioners' claims seeking recovery for their own injuries.

[2] Agent Orange was manufactured by respondents. The complaint alleges that Agent Orange "contained, as a byproduct of the manufacturing process, one of the most toxic chemicals known to man, a compound commonly referred to as TCDD or 'dioxin'" and that while in Vietnam petitioners "absorbed the deadly chemical through the air, through the skin and . . . through water and food." Original Petition at 8 (JA at 55). Petitioners seek damages for deaths and suffering from lymphomas, soft-tissue sarcomas, and other serious diseases that were caused by the veterans' exposure to Agent Orange in Vietnam; their family members seek damages for resulting wrongful death, loss of consortium, economic loss, and other harms. *Id.* at 12-13 (JA 59-60). The complaint arises under Texas statutes and common law, alleging defective design and manufacture, breach of express and/or implied warranties, strict products liability, negligence, failure to warn, breach of warranty, and deceptive trade practices. *Id.* at 8-15 (JA 55-62).

[3] The Second Circuit earlier held that federal law provides no legal remedy against respondents for injury as a result of the wartime use of Agent Orange. *In re "Agent Orange" Product Liability Litigation* (hereinafter "*Agent Orange*"), 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

ultimately accepted.[4] Both courts below upheld removal, however, on the theory that the All Writs Act permits district judges to remove otherwise non-removable cases whenever those judges deem it necessary to do so. **A8-A9**, **A54-A55**.

Simultaneously with filing their answer and notice of removal, respondents successfully urged the Judicial Panel on Multidistrict Litigation, over petitioners' objection, to transfer the case from Texas to the U.S. District Court for the Eastern District of New York. *See In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

2. *Proceedings in the District Court.*

Once the case was in the Eastern District of New York, the earlier *Agent Orange* litigation became the focus of the district

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[4] As the district court below summarized: "[T]he defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action 'because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction.' Second, the court's jurisdiction was invoked 'pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption.'" **A45** (quoting Notice of Removal). The district court accepted the "artful pleading" theory, *see Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), as a ground for removal. **A54**. The Second Circuit reversed, however, holding that the district court's "artful pleading" analysis misread applicable precedent. **A8**. Respondents abandoned their "complete preemption" theory.

Respondents belatedly moved in the district court "to amend their notice of removal to assert removal pursuant to 28 U.S.C. § 1442(a)(1)," on the peculiar theory that when they designed and marketed herbicides containing a deadly poison (which the government ultimately bought for use in Vietnam), they were somehow "persons" acting under a "federal officer" within the meaning of that provision. **A6**. Although neither the district court nor the Second Circuit addressed the theory in this case, **A9-A10**, the issue was resolved against respondents in a companion case involving civilians exposed to Agent Orange. *See Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). The court ruled that respondents' challenged actions were not taken pursuant to federal direction, because respondents were "being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." *Id.* at 950. It also noted that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." *Id.*

Thus, the sole removal issue before this Court concerns the propriety of removal under the All Writs Act.

court's decision both to uphold removal and to dismiss all of petitioners' claims.

A. The Earlier *Agent Orange* Litigation

Beginning in 1978, thousands of Vietnam war veterans and their families brought state-law tort actions against the present respondents seeking monetary relief as a result of illnesses and other injuries they believed they were suffering as a result of exposure to Agent Orange. **A3**. These lawsuits were consolidated in the U.S. District Court for the Eastern District of New York into a single action known as *In re "Agent Orange" Product Liability Litigation*, MDL No. 381. **A3**. The final complaint alleged that all the named plaintiffs had been exposed to Agent Orange and "were thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Supplemental Appendix, 2d Cir. No. 92-7537, 860, 878. None claimed to be uninjured or to have unaccrued future claims.

On December 16, 1983, the district court certified a Rule 23(b)(3) class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and set trial for six months later, on May 7, 1984. **A3-A4**.

As required by Rule 23(c)(2), the district court directed "to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Over respondents' objection, the class was defined to consist of all veterans and their families who had a "subjective" basis for claiming that Agent Orange had harmed them. *Agent Orange*, 100 F.R.D. 718, 728-29 (E.D.N.Y. 1983).[5] Consequently, individual, first-class mail notice was

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[5] The district court held: "The defendants' contention that the class as the court has defined it is unworkable because it is subjective ('all veterans who were injured . . . by exposure to Agent Orange') is a *non sequitur*. Subjectiveness does not affect the applicability of the class trial's findings to members of the class and it does not prejudice the defendants in any way. The class is, therefore, adequately defined and clearly ascertainable." *Agent Orange*, 100 F.R.D. at 728-29 (citation omitted). The Second Circuit denied respondents' mandamus petition to reverse certification of the class as so defined. *In re Diamond Shamrock Chemical Co.*, 725 F.2d 858, 860 (2d Cir. 1984).

On final merits review at the conclusion of the case, the Second Circuit reiterated that this class definition had been proper and that adequate notice had been given to those who subjectively believed that they had been injured by

directed to all persons with a lawsuit pending in federal court, or who had filed a complaint form with the Veteran's Administration's Agent Orange Registry. *Agent Orange*, 100 F.R.D. at 729.[6] The court also mandated notices in major newspapers and veterans' publications alerting veterans that "[i]f you or anyone in your family can claim injury, illness, death, or birth defect as a result of exposure to 'Agent Orange' . . . you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District Court of New York, unless you take steps to exclude yourself." *Id.* at 734. Limited radio and television notices were also required. *Id.*

The deadline for opting out of the Rule 23(b)(3) class was May 1, 1984. Six days later, on May 7, 1984, the named plaintiffs decided to settle the case rather than commence the trial as scheduled. They received what the Second Circuit characterized as "essentially a settlement at nuisance value," *Agent Orange*, 818 F.2d at 171, in exchange for agreeing that all class members would be forever barred from suing the defendants for injuries from Agent Orange.[7] However, as the courts below ruled, the parties agreed to bind not just the persons identified in the class notice (who subjectively believed that they had suffered injuries and that they

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Agent Orange: "Anyone who believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel." *Agent Orange*, 818 F.2d 145, 169 (2d Cir. 1987).

[6] The Veteran's Administration had established the Registry in 1978 to help "identify all Vietnam veterans expressing a concern about the possible adverse health effects of their exposure to Agent Orange." *Agent Orange*, 597 F. Supp. 740, 852 (E.D.N.Y. 1984). Notice was also directed to veterans who had expressed concerns about injury to state authorities. The Governor of each State was requested to refer the class notice "to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans. 100 F.R.D. at 730-31.

[7] The Settlement created a fund to benefit class members and their families which, as administered, eventually allotted an average of $3200 for death and total disability claims, and nothing for other claims. *See* **A39**. In exchange, the named plaintiffs agreed that respondents would not be "subject to liability or expense of any kind to any member of the Class" with respect to Agent Orange and that "[c]laims against the Fund shall be the exclusive remedy . . . and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants." *Agent Orange*, 597 F. Supp. at 864 (Settlement Agreement ¶ 5).

currently had a claim). Rather, in the settlement the parties expanded the class definition, stating: "The Class specifically includes persons who have not yet manifested injury." *Agent Orange*, 597 F. Supp. at 865 (Settlement Agreement ¶ 8).[8]

The district court approved the settlement despite its modest size, largely on the conclusion that the scientific evidence that existed on dioxin made it "highly unlikely" that any plaintiff whose claims were then pending in the courts could establish causation. *Agent Orange*, 597 F. Supp. at 749.[9] The court of appeals affirmed. *Agent Orange*, 818 F.2d 145 (2d Cir. 1987).

B. The District Court's Removal and Dismissal of the Case

Both the district court's decision to permit removal and its decision to dismiss petitioners' case flowed from its view that the instant action was "a direct challenge to the validity of the settlement" that the named plaintiffs had negotiated with defendants, and which the court approved. **A42**.

Thus, the district court ruled that "removal was proper because the court . . . must enforce its bar on subsequent suits by class members against the defendants." **A48**. The district court relied on a removal doctrine articulated by two earlier Second Circuit decisions (see pp. 23-24, *infra*), holding that the All Writs Act, 28 U.S.C. § 1651(a), "permits a federal court to remove state court actions to federal court [even] in situations where specific statutory removal authority is absent." **A55**. Resort to the All Writs removal doctrine was necessary, the court indicated, "[b]ecause by bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement." **A55**. Thus, it concluded, "[t]he removal of these actions to this court is a mechanism for protecting this court's judgment and order." **A55**.

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[8] By accepting this finding of the lower courts for purposes of review in this Court, petitioners do not waive their contract law objections to the lower courts' ruling that this sentence was intended to bind *absent* future claimants.

[9] The district court noted that although "[i]t is, of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed . . . it appears unlikely that such proof will develop in time to affect this litigation." 597 F. Supp. at 795. *See also Agent Orange*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (granting summary judgment against opt-out plaintiffs based on insufficiency of scientific proof).

The district court granted the motion to dismiss, finding that "[t]he terms of the Settlement Agreement . . . bar plaintiffs from proceeding with this action." **A55**. Petitioners argued that as of the opt-out deadline they had been unaware of any injuries from Agent Orange, and thus the named plaintiffs had no authority to bind them.[10] Under the 1984 class definition and class notice, of course, *only* veterans and their families who had a subjective basis for believing, as of May 1, 1984, that they were suffering injuries from Agent Orange exposure were in the class and were required to opt out to preserve their rights to future suit. See pp. 5-6 & note 5, *supra*.

The district court held that this point was "irrelevant" and that the parties to the settlement had legitimately decided (with its approval) *after* the Rule 23(b)(3) opt-out right had passed to expand the class and extinguish the unaccrued future claims of "'persons who have not yet manifested injury.'" **A55** (quoting settlement). Extinguishing such claims, the district court explained, advances "the interests of presently injured plaintiffs as well as defendants in achieving a settlement," by setting "definitive limits on defendants' liability." **A58**.

3. Proceedings in the Second Circuit

On appeal, the Second Circuit rejected both petitioners' objection to removal and their due process and other defenses to reading the 1984 settlement as extinguishing their claims.

The court found no basis for removing the case in the removal statute enacted by Congress. Instead, the Second Circuit reiterated

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[10] The uncontradicted record shows that the first symptoms of petitioners' injuries manifested themselves only *after* the opt-out deadline. The complaint specifically recites that "[t]he deaths occurred and the diseases and injuries were manifested only *after* May 7, 1984, when other veterans' actions against these Defendants were settled." Original Petition at 12 (JA 59) (emphasis in original). There is no evidence in the record that any of petitioners "believed that he or she had suffered injury as a result of exposure to Agent Orange in Vietnam" (see note 5, *supra*) or had any basis at that point for believing that he or she "can claim injury, illness, disease death or birth defect" and thus should "take steps to exclude yourself" from the class (see p. 6, *supra*). Indeed, there is no evidence that any petitioners knew that they had been exposed to Agent Orange, or that they had even heard of the *Agent Orange* litigation. *See, e.g.*, **A68-A69** (affidavit of Shirley Ivy).

its view that "a district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case." **A8**. The "exceptional circumstances" in this case involved an undefined "deleterious effect" of allowing "Agent Orange victims . . . to maintain separate actions in state court." **A8**. The court was concerned that such suits raised the prospect that a state court would have to "decid[e] the scope of the *Agent Orange I* class action and settlement," so that the task would not fall to "[t]he court best situated to make this determination" — namely, "the court that approved the settlement." **A8-A9**. Removal jurisdiction was supposedly necessary to help the district court "guard[] the integrity of its rulings in complex multidistrict litigation." **A9**. The Second Circuit did not explain why an ordinary state court judge could not be trusted to correctly decide the meaning of the settlement negotiated by the parties, and the extent to which Rule 23 and due process might limit its binding effect.

Thus, for the third time (see pp. 23-24, *infra*), the Second Circuit employed the All Writs Act to allow district judges to fashion their own removal jurisdiction "'when the need arises.'" **A9** (citation omitted). Further, it made clear that whether or not "exceptional circumstances" exist to create such jurisdiction is a matter left to the "proper exercise of judicial discretion." **A9** (citation omitted).[11]

After upholding removal, the Second Circuit rejected petitioners' claim that to permit the parties to the 1984 settlement to extinguish petitioners' unaccrued future claims, without notice and opt-out rights, violated Rule 23 and due process. The Second Circuit went even further than the district court to hold that there is no due process barrier *at all* preventing already injured plaintiffs from negotiating away the legal claims of absent persons as long as those persons are not "known" — that is, no one (including them) knows that they will be injured and might wish to sue in the future. **A16**.

The court's rationale for this holding was that in *Phillips*

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[11] As respondents' brief below had noted in considerable detail, the Second Circuit "reviews exercise[s] of authority under the All Writs Act for abuse of discretion, and upholds the lower court's order unless the findings on which it is based were clearly erroneous." Brief for Defendants-Appellants, dated Nov. 16, 1992, at 60 (citations omitted).

Petroleum Co. v. Shutts, 472 U.S. 797 (1985), this Court addressed only the ability of named plaintiffs "to bind *known* plaintiffs" concerning money damages, and "intimate[d] no view concerning other types of class actions." **A16** (quoting 472 U.S. at 811 n.3) (emphasis added). Rather than reading this statement as disclaiming any holding about lawsuits for equitable relief (like the *Ticor Title* case now before this Court), the Second Circuit believed that it somehow would have "to extend *Shutts*" in order to prevent named plaintiffs from extinguishing the unaccrued claims of absent persons to money damages, before they even know those claims exist. **A16**. Refusing to "extend" *Shutts* to provide procedural guarantees to such persons, the court opined:

> [S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good.

A17. The Second Circuit was also unconcerned that "'many genuine conflicts of interest' [can exist] in a situation such as this," so that separate class counsel should have decided whether to extinguish the unaccrued future claims of absent plaintiffs who had not yet suffered injury. **A17** (quoting district court). It opined that a conflict "never materialized" because all veterans became eligible for identical "nuisance value" payments from the Fund. **A18**.[12]

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[12] The Second Circuit suggested here that "ensuring that [persons unaware of their injuries] receive vigorous and faithful vicarious representation" was a constitutionally adequate substitute for the right to notice and to opt out. **A17**. Thus, the court refused to require that uninjured absent persons unaware of their rights have independent class counsel. Nor did the Second Circuit address the inherent conflict revealed by the district court's own rationale for denying notice or opt out: to advance the interests of presently injured plaintiffs and defendants in settlement. **A58**. Instead, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary." **A21**.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD DETERMINE WHETHER FEDERAL DISTRICT JUDGES MAY USE THE ALL WRITS ACT, IN THEIR DISCRETION, TO REMOVE AN "OTHERWISE UNREMOVABLE STATE COURT CASE"

The first question presented by this case is whether the Second Circuit is correct in permitting federal district judges to use the All Writs Act, as it put it, "to remove an otherwise unremovable state court case . . . 'when the need arises.'" **A9-10** (citation omitted). This case raises issues of judicial restraint and federalism so serious that a total of 21 States appeared as *amici* below to protest what they termed "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

Whether removal can ever be effected by means other than the pertinent statutes enacted by Congress is a question on which the lower courts have divided, making review by this Court all the more critical. The Second Circuit, and two district courts in other circuits, have held that there *is* removal power under the All Writs Act.[13] Three circuits have disagreed, holding that only Congress's jurisdictional statutes can authorize jurisdiction in a case.[14] Still

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[13] *Hornsby v. Hornsby's Stores, Inc.*, 1991 WL 33672 (N.D. Ill. 1991) ("[s]tate claims precluded by the res judicata effect of a federal judgment may be removed to federal court" even when there is no basis other than the All Writs Act for removal); *Nowling v. Aero Servs. Int'l, Inc.*, 734 F. Supp. 733, 738 (E.D. La. 1990) ("Other statutes vest federal courts with the authority to exercise [removal] jurisdiction . . . for example, the All Writs Act").

[14] *See Westinghouse Elec. Corp. v. Newman & Holtzinger*, 992 F.2d 932, 937 (9th Cir. 1993) (All Writs Act does not "provide[] an independent source of removal jurisdiction to the district court"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988) ("The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. § 1441"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) ("Section 1651(a) does not operate to confer jurisdiction"); *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied*, 406 U.S. 945 (1972) ("This statutory provision does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *M. Brittingham v. United States Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) ("[The All Writs Act] empowers [courts] to issue writs in aid of jurisdiction previously acquired on some other independent ground"). *See also United States v. Hall*, 583 F. Supp.

other courts have construed their removal power so narrowly that they have not even had occasion to reach the question decided by the Second Circuit. *See* note 15, *infra*.

A. The All Writs Removal Doctrine Is Constitutionally Indefensible and Should Be Repudiated in Its Entirety

The grounds for removal of cases from state court are simple enough. They are set out at 28 U.S.C. §§ 1441 to 1452. Seven distinct provisions exist:

(1) § 1441(a) (original jurisdiction removal);
(2) § 1441(d) (removal by a foreign state);
(3) § 1442 (removal by a federal officer or property holder);
(4) § 1442a (removal by a member of armed forces);
(5) § 1443 (removal in civil rights cases);
(6) § 1444 (removal in foreclosure actions against federal government); and
(7) § 1452 (removal of claims related to a bankruptcy case).

This set of provisions is the product of congressional deliberation about how much to restrict "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).[15] The balance struck by

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717, 718 (E.D. Va. 1984) ("[T]he All Writs Act is not a means by which a district court may extend its authority in areas where it otherwise has no jurisdiction").

[15] The importance of deference to congressional choices in this area has led this Court to caution that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934). This Court has made the point in the specific context of removal jurisdiction. *See American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18 (1951) ("To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit . . . would by act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress denied them"). *Cf. Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (discussed in note 30, *infra*).

Congress has varied widely over time.

At one end of the spectrum, exhibiting maximum deference to the States, the Judiciary Act of 1789, 1 Stat. 73, 79-80, granted *no* federal question removal at all, and permitted removal in diversity cases in only three limited categories, and then only where substantial sums of money were at stake.[16]

In 1875, Congress went to the opposite extreme: its distrust of the States' judicial systems during the Reconstruction period was so great that Congress "enormously broadened the removal as well as the original jurisdiction," so that "virtually every case removable under Article III was made removable by *either* a plaintiff *or* a defendant."[17] This regime was of particular benefit to defendants,

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Many lower courts have emphasized the need narrowly to construe the removal statute. *See, e.g., United States ex rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir.) ("The right of removal being in derogation of state sovereignty, should not be enlarged beyond what is definite and free from ambiguity") (internal quotations and citations omitted), *cert. denied*, 423 U.S. 849 (1975); *Adams v. Aero Services Int'l, Inc.*, 657 F. Supp. 519, 521 (E.D. Va. 1987) ("Removal of civil cases to federal court is an infringement on state sovereignty. Consequently, the statutory provision regulating removal must be strictly applied."); *Mercy Hosp. Ass'n v. Miccio*, 604 F. Supp. 1177, 1179 (E.D.N.Y. 1985) (Weinstein, C.J.) ("The right to removal is a statutory grant to be strictly construed . . . . The defendant seeking removal must base the petition on a specific removal provision and specific grant of original jurisdiction").

[16] *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988) (hereinafter "HART AND WECHSLER") (noting that only an alien defendant, an out-of-state defendant sued by a citizen of the forum state, or a party to certain kinds of title disputes, could remove if at least $500 was in dispute). Even *original* jurisdiction for federal question cases was extraordinarily limited in the first Judiciary Act. *See id.* at 961.

The severely limited removal jurisdiction authorized by Congress in 1789 is hardly surprising, given that "[m]any of the Framers of our Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285 (1970). Easing concern about federal courts encroaching on the judicial systems of the States, of course, was an important aspect of the effort to ratify the Constitution. *See, e.g.*, Alexander Hamilton, *The Federalist* No. 82 (C. Rossiter ed. 1961) 493 (explaining that "State courts will be deprived of no part of their primitive jurisdiction further than may relate to an appeal; and . . . in every case in which [state courts] were not expressly excluded" they will have "cognizance of the causes" arising under federal law).

[17] HART AND WECHSLER, *supra* note 16, at 961, 1052, 1767 (emphasis added) (citing Act of March 3, 1875, 18 Stat. 470).

permitting them to remove *merely by asserting a federal defense*. "[T]he answer as well as the complaint would be consulted before a determination was made" on whether a federal issue existed, and "the defendant's petition for removal could furnish the necessary guarantee that the case necessarily presented a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983).

Although the 1875 Act certainly constituted a "rational jurisdictional system," 463 U.S. at 10 n.9, it also caused a "flood of litigation" into the federal courts, leading Congress a decade later to "pare down the federal question jurisdiction."[18] Congress addressed the overload problem through the enactment of the Judiciary Act of 1887, which established the present pattern of removal jurisdiction.[19] The "key element" of the 1887 Act "was (and is) to tie removal jurisdiction to original jurisdiction," a requirement now found in § 1441(a) and one that "has had a profound impact on the jurisdictional structure."[20]

In light of Congress's "purpose [in the 1887 Act] to restrict the jurisdiction of the federal courts on removal," coupled with "[t]he power reserved to the states," this Court has given the Act a "strict construction." *Shamrock Oil & Gas Corp.*, 313 U.S. at 108. Accordingly,

> it is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis in original) (citing *Franchise Tax Board*, 463 U.S. at 12).

The Second Circuit, however, has not been satisfied to adhere to the jurisdictional structure of the 1887 Act, narrowly construed, which allows much less removal than existed under the 1875 Act.

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[18] HART AND WECHSLER, *supra* note 16, at 963.

[19] *Id.* at 1768 (citing Judiciary Act of March 3, 1887, 24 Stat. 552, corrected by the Act of August 13, 1888, 25 Stat. 433).

[20] *Id.* at 1052-53.

Rather, the Second Circuit has taken the view that Congress's choice in 1887 to restrict the 1875 removal statute can be circumvented by judges based on reference to a *separate* law: the All Writs Act, of all things! That Act has remained substantially unaltered since 1789,[21] and has never been addressed by Congress in setting removal policy during the past two centuries. Yet, according to the Second Circuit, that Act provides an independent source of authority for subject-matter jurisdiction on removal.

Thus, beginning in 1988, the Second Circuit has explicitly permitted district judges to invoke the All Writs Act to justify removal even without "an independent basis for the exercise of jurisdiction under the federal removal statutes."[22] Accordingly, the district court below held that the All Writs Act "permits a federal court to remove state court actions to federal court in situations where *specific statutory removal authority is absent.*" **A55** (emphasis added). The Second Circuit confirmed that district judges "may remove an *otherwise unremovable* state court case . . . 'when the need arises,'" and upheld removal in this case as "appropriate" and "a proper exercise of judicial discretion." **A8-A9** (emphasis added) (citation omitted). Despite an early dissent from the doctrine, it now appears well entrenched in the Second Circuit.[23]

The Second Circuit's All Writs removal doctrine poses a threat to two fundamental aspects of this Court's jurisprudence: judicial restraint and judicial federalism:

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[21] The present version of the All Writs Act originated as § 14 of the Judiciary Act of 1789, 1 Stat. 81-82. *See Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 40-41 (1985).

[22] *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 865 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989).

[23] Dissenting in *Yonkers*, Judge Mahoney castigated the Second Circuit's creation of an All Writs removal doctrine to launch "a preemptive strike upon a state court" as "novel and unwarranted," pointedly noting that, like federal judges, state court judges are "sworn to support the Constitution of the United States. Accordingly the state court was entitled to a presumption at the outset" that it would proceed appropriately. 858 F.2d at 875 (Mahoney, J., dissenting). No other Second Circuit judge has ever dissented from use of the doctrine, however, and the suggestion below for rehearing *en banc* attracted no votes. Thus, the doctrine appears to be settled law in the Second Circuit.

For a more detailed description of *Yonkers* and the steadily increasing ambit of the Second Circuit's All Writs removal doctrine, *see* pp. 23-24, *infra*.

First, the doctrine constitutes "an illegitimate judicial amendment of Congress's removal statute," Brief *Amici Curiae* of the 21 States, at 18, that this Court should not permit to stand. It is well settled that "[a]ll federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). Thus, whenever an objection is raised to removal, "[t]he fundamental question to be determined is whether the removal . . . from the state court into the Federal court was authorized by any statute of the United States." *Kentucky v. Powers*, 201 U.S. 1, 24 (1906). In resolving such an issue, of course, courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934).[24]

Despite these principles, the Second Circuit nonetheless permits a district court, in so-called "exceptional circumstances," to "use its All Writs authority to remove an otherwise unremovable state court case." **A8**. There are grave reasons to doubt this construction of the All Writs Act.

The language of the Act hardly suggests that it grants judges the power to *create or define* their own jurisdiction. Rather, it appears to provide tools for judges to use in *exercising* whatever jurisdiction they happen to possess — to "issue all writs necessary or appropriate *in aid* of their *respective* jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (emphasis added). The Second Circuit below refused to accept this limit, even as it quoted the express holding of this Court that the point of the All Writs Act is to "'empower[] federal courts to fashion extraordinary *remedies* when the need arises.'" **A9** (quoting *Pennsylvania Bureau of Corrections v. United States Marshals*, 474 U.S. 34, 43 (1985) (emphasis added)).

This Court was also quite clear in *Pennsylvania Bureau* that the Act must be set aside once Congress has spoken on a subject:

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[24] Since the inception of our federal system, it has been settled that "[c]ourts created by statute can have no jurisdiction but such as the statute confers," *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Where jurisdiction is not expressly conferred, it is assumed not to exist. *See Durousseau v. United States*, 10 U.S. (6 Cranch) 307 (1810). *See also* note 15, *supra*.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

474 U.S. at 43.[25] Congress, of course, could hardly have been more exacting in defining removal jurisdiction in 28 U.S.C. §§ 1441 to 1452, and thus it is difficult to see why any judge should be permitted to look beyond those carefully crafted provisions and infer subject-matter jurisdiction in the "exercise of judicial discretion" (**A9**) under the All Writs Act. Indeed, at least two decisions of this Court have resisted far more modest arguments that the Act should be used to supplement the structure of appellate jurisdiction and procedure established for this Court by Congress.[26]

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[25] The facts of *Pennsylvania Bureau* illustrate the limits of judicial authority even when fashioning remedies where jurisdiction itself is clear. This Court refused to allow a federal district court to exercise its All Writs power to compel federal Marshals to share in the financial burden of transporting state inmates to federal courts for litigation in which the state is not involved, where the Marshals' obligations were regulated by a somewhat ambiguous federal statute. 474 U.S. at 37-38, 43. The arguments for permitting district courts to seize "otherwise unremovable" state court cases contrary to a clear federal removal statute are obviously much weaker.

[26] In *Chandler v. Judicial Conference of the Tenth Circuit*, 398 U.S. 74 (1970), District Judge Chandler invoked the All Writs Act, asking this Court to reverse the decision of the judges of the Tenth Circuit to strip him of his judicial functions, in an alleged usurpation of the impeachment power. *Id.* at 75, 82. The Tenth Circuit Judicial Council argued that Chandler was complaining of "purely administrative action" that had "never been reviewed in any court and cannot now be reviewed in an original proceeding under the All Writs Act." *Id.* at 83. The Solicitor General argued that a finding of jurisdiction was proper under the All Writs Act because the action of the Judicial Council could be "analogized" to the Tenth Circuit sitting *en banc*, in an appellate function. *Id.* at 83-84. This Court rejected that argument, explaining that the All Writs Act "authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are *in aid of its jurisdiction*,'" and holding that review of Chandler's claims would "do[] violence to the constitutional requirement that such review be appellate." *Id.* at 86 (emphasis added) (citation omitted).

Similarly, in *United States v. FMC Corp.*, 1963 U.S. LEXIS 2449 (1963), (Goldberg, Circuit Justice), this Court rejected the Solicitor General's argument that the All Writs Act authorized immediate review in this Court of a district judge's refusal to issue a preliminary injunction against an imminent corporate acquisition. The relevant statute permitted immediate appeal only from *final*

This case is especially suited for testing the outer limits of the All Writs Act, for here the Second Circuit has sought to countermand a considered policy judgment of Congress. The district court upheld removal of petitioners' Texas state court case on the basis of defendants' argument that "the binding effect of the Settlement Agreement" barred petitioners' lawsuit. **A55**. Even assuming that the interpretation of the Settlement Agreement (essentially, a contract negotiated in New York) raised *any* issue of federal law, at most the defendants have a *federal defense* to suit in Texas state court. But more than a century ago Congress barred any such theory for removal, *see* pp. 13-14, *supra*, and has so far rejected all proposals to water down its stance.[27] The Second

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judgments, but the Solicitor General argued that appellate jurisdiction should be found under the All Writs Act "to prevent irreparable change in the economic status quo . . . [that would] frustrate effective public relief." *Id.* Despite these exigencies, the Circuit Justice ruled that the All Writs Act "may not be employed to evade the specific restrictions" of the jurisdictional statute, and that no writ could issue "as a substitute for an authorized appeal."

The course taken by the Second Circuit — to use the All Writs Act to remove state court cases that Congress chose to leave to the state courts — is far more radical than the course suggested by the Solicitor General in either of these cases. By contrast, other lower federal courts have refused to use the All Writs Act even to review *federal* cases outside their direct line of review. *See, e.g.*, *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976); *General Electric Co. v. Byrne*, 611 F.2d 670, 672 (7th Cir. 1978) (*per curiam*) ("We are aware of no statute or decision which would authorize us to issue a writ of mandamus directed to a district judge sitting in another circuit"); *C.P.C. v. Nosco Plastics, Inc.*, 719 F.2d 400, 401 (Fed. Cir. 1983) (All Writs Act does not confer authority to review decisions of a district court over which the appellate court does not have supervisory power).

[27] "Commentators have repeatedly proposed that some mechanism be established to permit removal of cases in which a federal defense may be dispositive." *Franchise Tax Board*, 463 U.S. at 10 n.9 (citing proposals). Unfortunately for defendants, of course, "those proposals have not been adopted." *Id.*

Notably, Congress has rejected some reform proposals a good bit *narrower* than the course taken by the courts below. For example, in 1969, the American Law Institute proposed that federal removal jurisdiction be expanded so as to permit removal if "a substantial defense arising under the Constitution, laws, or treaties of the United States [were] properly asserted." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 1312(a)(2) (1969). Even under the ALI plan, however, this case could not have been removed from state court, because that proposal excluded from removal those "actions in which the only ground for removal [would be a] claim that the suit or relitigation of an issue in the suit is barred by an adjudication from another

Circuit's attempt to serve, to borrow an apt phrase, as "a sort of junior-varsity Congress," *Mistretta v. United States*, 488 U.S. 361, 427 (1988) (Scalia, J., dissenting), should be overturned.

Second, beyond the Second Circuit's circumvention of well-accepted principles of judicial restraint, certiorari is also warranted because its blanket grant of permission to remove cases whenever district judges find "exceptional circumstances" flouts this Court's teachings on judicial federalism and the respect due the coordinate judicial systems of the States.

In explaining the "exceptional circumstances" supposedly requiring that this case be removed, the Second Circuit made little effort to mask its distrust of the abilities of the Texas state courts. Permitting the case to go forward in Texas would have a "deleterious effect," according to the Second Circuit, because the state court would have to "decid[e] the scope" of the 1984 settlement and the associated due process issues. **A8-A9**. The Second Circuit thought it critical that the judge who "approved the settlement" — the judge "*best situated* to make this determination" — decide the preclusive effect of the prior settlement agreement. **A9** (emphasis added). State courts apparently cannot be trusted to "guard[] the integrity of [federal court] rulings in complex litigation." *Id.*

Obviously, the Texas state courts in this case should have been presumed competent to adjudicate the preclusive effect of the 1984 settlement.[28] If state courts are competent to determine federal

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court that the Constitution or laws of the United States require the State court to honor." *Id.* at § 1312(b)(9). *See also* "Multiparty, Multiforum Jurisdiction Act," H.R. 3406, 101st Cong. 2d Sess. (1990) (another proposed jurisdictional expansion much more modest than the court's holding in this case which was rejected by Congress).

[28] As one esteemed scholar of federal courts doctrine incisively observed, there is "nothing more subversive to the judge's inner sense of responsibility than the notion that, to the greatest possible extent, all the important shots will be called by someone else because we don't believe in his or her competence and sensitivity." Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624 (1981). As an essential feature of comity, state courts are routinely entrusted with the adjudication of federal rights, including federal constitutional rights. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988) ("Texas state courts . . . are presumed

constitutional rights, then *a fortiori* there is no basis for denying them responsibility for adjudication of the preclusive effect of a settlement. Indeed, one key feature of judicial federalism is that federal and state courts alike are trusted to give appropriate effect to the results of litigation in the other judicial system. *See Kline v. Burke Const. Co.*, 260 U.S. 226, 230 (1922) ("Whenever a judgment is rendered in one of the courts [either federal or state] and pleaded in the other, the effect of that judgment is to be determined by" the second court"); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964).[29]

As 21 States trenchantly observed in their *amicus* brief below:

> For as long as there has been a common law . . . when a prior judgment of a court in another jurisdiction, whether

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competent to resolve federal issues"). *See also* Bator, at 625 ("If we want state judge to feel institutional responsibility for vindicating federal rights, it is counterproductive to be grudging in giving them the opportunity to do so").

[29] These precedents comport with a fundamental principle of our federal system, that "[a] state court is as well qualified as a federal court to protect a litigant by the doctrines of res judicata and collateral estoppel." *Southern California Petroleum Corp. v. Harper*, 273 F.2d 715, 719 (5th Cir. 1960); *accord Bluefield Community Hospital Inc. v. Anziulewicz*, 737 F.2d 405, 408 (4th Cir. 1984).

Consistent with this principle, in the area of consent judgments it is quite unusual for a court to hold, as the Second Circuit below did, that the individual judge who reviewed and approved a settlement has a special, subjective insight into its meaning. For example, in one prominent case the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that *he himself* had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that enormously complicated case. *See United States v. Western Electric Co.*, 900 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990). The D.C. Circuit ruled that although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," *id.* at 294 n.10, it had to "reject [any] suggestion" Judge Greene's later view of the decree "should be afforded some 'special' deference," even though he had a major part in "draft[ing] the pivotal provision" and even though he "had enormous experience overseeing the case and the decree since its inception." *Id.* at 294. *See also Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"). Obviously, if federal appellate courts should not defer to the subjective views of district judges on the meaning of settlements, then state courts need not defer — and cases should not be removed from state courts in an effort to ensure that a particular individual rules on what the parties appear to have intended by a certain settlement.

> state or federal, has been raised as a bar to litigation of a claim, the issue has been decided by the court at hand, not referred back to the court that entered the original judgment.

Brief *Amici Curiae* at 3 (emphasis in original). The States objected that the district court had "supplanted this time-tested rule with a radical new one: when a federal class action judgment is involved, *only* the court that handed down the original judgment is qualified to decide" the preclusive effect of the prior settlement. *Id.* (emphasis in original). They pointed out that this theory is "contrary to common sense" and "destructive of judicial federalism," *id.*, and called the district court's seizure of the case on this theory an "unprecedented, unwarranted, and unwise . . . invasion of state judicial independence and an insult to state courts throughout the nation, which are perfectly capable of deciding whether a state law claim is barred by a prior federal judgment." *Id.* at 18.

The States warned that "[t]o affirm the decision below would be to invite every federal district court to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings." *Id.* at 16. Yet the Second Circuit analyzed *none* of these federalism concerns, failing to mention the States' arguments even in passing. Indeed, in the aspect of its opinion most dangerous for judicial federalism, the court made clear that district judges are free to resort to All Writs removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**. Thus, *ad hoc* seizure of state court jurisdiction is given no more appellate scrutiny than is afforded garden-variety trial court evidentiary determinations. *See, e.g., Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (describing leniency of evidence review standard).

Finally, it should be noted that the Second Circuit's expansive view of removal jurisdiction under the All Writs Act, in derogation of state courts, also contravenes the policies of the Tenth Amendment.[30] Indeed, because what is at issue is a federal

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[30] One of the "powers [reserved to the states under the Amendment] was the maintenance of state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R.*, 398 U.S. at 285. *See also Pennzoil Co. v. Texaco,*

judicial act, not subject to the "political checks" of federalism, *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 549-51 (1985), this Court should be particularly sensitive to the Tenth Amendment interests implicated here.

Certainly, the judgment below cannot be defended on the theory that removal was necessary to protect the district court's continuing jurisdiction. First, a state court must be presumed to be competent to adjudicate the settlement's preclusive effect. *See* notes 28 & 29, *supra*. A federal court obviously cannot assume, as the district court did below, that a state court would incorrectly adjudicate this question and would erroneously permit plaintiffs "to undermine a settlement agreement and set aside a federal court's judgment through new state court suits." **A54**.

Second, in any event, the district court's continuing jurisdiction in this case could not have been threatened by petitioners' Texas action. Their case manifestly was not, despite the district court's assertion, a "challenge[]" to the settlement agreement. **A49**. Rather, petitioners sought to pursue their own suit for money damages, entirely separate from the settlement, on the ground that they were not bound by it. The settlement agreement provided that the district court would retain jurisdiction *only* "over the Fund pending its final disposition," *Agent Orange*, 597 F. Supp. at 866 (Settlement Agreement ¶ 19), with a duty "to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." *Id.* at 864 (Settlement Agreement ¶ 4). Nothing about petitioners' Texas lawsuit affects the

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Inc., 481 U.S. 1, 12-13 (1987) ("This Court repeatedly has recognized that the States have important interest in administering certain aspects of their judicial systems.") Given that the integrity of an important state institution is at stake, this Court should accord review to a judicial interpretation of the All Writs Act that deprives state courts of their traditional authority to resolve the preclusive effect of judgments of another sovereign. Accordingly, in *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), this Court refused to read a federal statute, the Age Discrimination in Employment Act, so as to constrain state judicial systems by forbidding mandatory retirement of state court judges. *Id.* at 2408. *Cf. New York v. United States*, 112 S. Ct. 2408, 2428 (1992) (Tenth Amendment prohibits federal statutes which are interpreted to "infring[e] upon the core of state sovereignty . . . a state's ability to make and *apply* its own laws") (emphasis added). Thus, in light of the Tenth Amendment, federal statutes should not be construed to impinge on fundamental state institutions without a clear statement of congressional intent requiring that outcome. No such clear statement appears on the face or in the legislative history of the All Writs Act.

operation of the Fund. The prospect that respondents may have to invoke, in a Texas forum, the supposedly preclusive effect of the settlement clearly has no bearing on the Fund; on the contrary, ¶ 4 of the Settlement Agreement expressly provides that at this juncture respondents "have no responsibility or obligation with respect to the Fund or distributions therefrom." *Id.* at 864.

Finally, the availability of authority under the All Writs Act to issue *injunctions* "in aid of . . . jurisdiction[]" indicates that there is no power to *remove* a state court action on that basis. Indeed, Congress went so far as to enact an exception to the Anti-Injunction Act using these same words. *See* 28 U.S.C. § 2283 (exception "where necessary in aid of its jurisdiction"). Thus, Congress was careful to vest the federal courts with targeted equitable powers even against state courts; but it also made the deliberate decision not to provide federal courts with sweeping *removal* authority. To ignore the fundamental difference between the two, and to read into the removal statute a power to disrupt state proceedings that Congress has set out only in the context of injunctions, would effectively rewrite Congress's handiwork.

B. Even If the All Writs Act Authorizes Lower Courts to Remove an "Otherwise Unremovable State Court Case" in Some Situations, This Court Should Articulate Clear Limits on the Use of That Power

Although All Writs removal is inappropriate in all circumstances, certiorari would be warranted even if this Court were inclined to reject that contention. At minimum, review should be granted to check the Second Circuit's spiraling pattern of jurisdictional expansion and to clarify the boundary of lower courts' authority under the All Writs Act.

As previously noted, the Second Circuit's All Writs removal doctrine originated in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). See p. 15, *supra*. The City of Yonkers had pursued a policy of racial segregation in allocating public housing and, as a result, had violated minority housing residents' federal constitutional and statutory rights. Under the obligation of a federal court order, the city sought to remedy this violation by initiating condemnation proceedings in state court. Although the case was not otherwise

removable, the Second Circuit permitted removal under the All Writs Act because the district court was confronted "both with the need to vindicate the constitutional rights of those . . . who have been denied fair housing and the very real possibility that the City of Yonkers would be subjected to inconsistent orders from the state court and the federal court." *Id.* at 863.

The Second Circuit substantially broadened the doctrine in *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992), this time upholding All Writs removal even absent the need to vindicate federal constitutional rights. Faced with a state court suit concerning the validity of procedures under a federally ordered sewage disposal plan, the court held that the mere possibility that New York might be subject to inconsistent federal and state decrees alone was sufficient to justify removal. *Id.* at 469.

Unlike the Second Circuit's earlier cases involving its novel removal doctrine, however, this case presents *no* threats to respondents' or third parties' constitutional rights, and *no* possibility that respondents might be subject to conflicting state and federal injunctive orders.[31] In short, this case presents *neither* of the rationales supporting the *Yonkers* or *City of New York* decisions. The courts below nevertheless approved removal yet again, this time of a quintessentially state-law case, finding the existence of "exceptional circumstances" — here, the courts' view that the Texas state courts might rule incorrectly on whether the 1984 settlement precluded suit, whereas the district court here was "best situated" to rule correctly. See pp. 9, 19, *supra*.

Certiorari was not sought in *City of New York*, and the certiorari briefing in *Yonkers* revealed an inappropriate vehicle for review.[32]

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[31] Petitioners' claims seek monetary relief.

[32] *Yonkers* was the Second Circuit's initial use of the All Writs removal theory, and the petition for certiorari presented the issue in nine pages as one involving error on the facts of the case. Petition for Certiorari, *Yonkers Racing Corp. v. City of Yonkers*, No. 88-1029, at 7-15. Indeed, Rex Lee appeared on behalf of the City of Yonkers opposing certiorari, stating that "the decision is sui generis" and that petitioner had "argue[d] only that the decision is 'based upon a misapplication of a recent decision of this Court.'" Brief of Respondent City of Yonkers in Opposition, No. 88-1029, at 12-13 (quoting petition). Finally, although the City agreed that the Second Circuit had erred in using the All Writs Act to remove the case, *id.*, it nonetheless urged: "The error below is, in the

This case thus represents the first real opportunity for scrutiny of the Second Circuit's radical All Writs removal doctrine, and certiorari is warranted to put an end to "an illegitimate judicial amendment of Congress's removal statute." Brief *Amici Curiae* at 18.

II. THIS COURT SHOULD PASS ON THE ACCEPTABILITY OF A QUASI-LEGISLATIVE ANALYSIS FOR DETERMINING WHETHER ALREADY INJURED NAMED PLAINTIFFS MAY EXTINGUISH THE UNACCRUED FUTURE CLAIMS OF ABSENT PERSONS

Even if federal removal jurisdiction somehow existed in this case (or if this Court were to decline to review that question), there would be a further question worthy of certiorari: under Fed. R. Civ. P. 23 and due process, in what circumstances (if any) may *already* injured named plaintiffs, in a Rule 23(b)(3) class action for money damages, contract to extinguish the unaccrued *future* claims of absent persons? This Court is currently considering similar issues in a related context, that of non-opt out, Rule 23(b)(2) class actions, in *Ticor Title v. Brown*, No. 92-1988. But the issues in this case merit review regardless of the outcome in *Ticor Title*.

As illustrated by *Ticor Title* and the several other major class action cases this Court has reviewed, the procedural standards governing the conduct of class actions are extremely important and affect large numbers of litigants. The extent to which federal settlements of Rule 23(b)(3) class actions may bind individuals who are not even aware that they have suffered injury is an issue which this Court has never addressed and which is now of significant and growing importance.[33] This is particularly true in our complex

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circumstances of this case, purely a procedural one. Because the district court clearly was correct in its ultimate conclusion that the City should prevail in the condemnation proceedings, any reversal now would merely delay the ultimate implementation of the district court's remedial orders." *Id.* at 13.

[33] *See, e.g., Carlough v. Amchem Prods., Inc.*, No. 93-1429, 1993 U.S. App. LEXIS 24930 (3d Cir. September 29, 1993) (discussing certification of 23(b)(3) class of future asbestos claimants); *Dante v. Dow Corning Corp.*, 143 F.R.D. 136, at *4 (N.D. Ohio 1992) (conditionally certifying a nationwide 23(b)(3) class of future silicone breast implant claimants); *In re Breast Implant Litig.*, 1992 U.S. Dist. Lexis 10080, at *4 (May 21, 1992, N.D. Ohio)

technological society, in an era when tens of thousands of persons may become injured by toxic substances or dangerous products, but will not manifest observable harm until years later.

The concept of adjudicating or settling through a class action the interests of persons who are completely unaware of any injury, although they have been placed at risk in some manner by a potential defendant, is quite controversial in itself. As the Advisory Committee observed in an oft-quoted Note to the 1966 Amendments to the Federal Rules of Civil Procedure, "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action" because of the preponderance of individualized issues involved. Although class actions in the mass accident and even mass tort context have won increasing acceptance, they have almost always been limited to class members who have manifested some sort of perceptible injury, know that they may have a legal interest, and thus are in a position intelligently to evaluate whether to be part of a class action.

Binding persons to the results of a class action prosecuted by others when they *do not* know they have been injured and at most have a unaccrued *future* claim for injury is problematic on at least three levels. First is a concern about basic fairness. In the statute-of-limitations context, for example, this Court has been unwilling to foreclose victims' legal interests based on "blameless ignorance," refusing to permit rights to lapse on the theory that people should be "charged with knowledge" of risks to which they have been unknowingly exposed. *Urie v. Thompson*, 337 U.S. 163, 169-170 (1949). This concern is compounded by the unavoidable conflict of interest between already injured plaintiffs and those who will develop illnesses in the future. Even in the absence of venality or corruption, the *former* group of plaintiffs, and their attorneys, have a natural incentive to settle the claims of the *latter* at relatively low value, in order to make a settlement as likely as possible by making the settlement package as attractive as possible for the defendant.

Second is the issue of standing: to the extent that resolution of a class lawsuit depends on the adjudicatory power of an Article III court, it may be illegitimate to include persons who have manifested

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(amending class definition to include "persons who are likely to suffer or are at an increased risk of suffering any adverse medical condition as a result ... of having received a silicone gel breast implant").

no perceptible injury from a possible risk to which they may have been exposed.[34]

Third, beyond the basic "case or controversy" question, the idea that federal judges should supervise the negotiation and final settlement of the substantive legal claims of absent persons before these claims have even accrued strains traditional concepts of the judicial role. An excellent benchmark for evaluating such a role is provided by the dissent in *Hoffman-La Roche, Inc. v. Sperling*, 110 S. Ct. 482, 488 (1989) (Scalia, J., joined by Rehnquist, C.J.). That case upheld somewhat novel "case management" techniques by a district judge in an age discrimination case. The judge assisted the main plaintiff in discovering the names of potential plaintiffs who might wish to join the case, and supervised the notice they would receive. The dissenters argued that even *case management* of such *future* cases, involving known potential plaintiffs who would have to opt in to be bound, was "an extraordinary application of the federal judicial power," at odds with "a system in which courts are not inquisitors of justice but arbiters of adversarial claims." *Id.* at 489, 492. Far more extraordinary, of course, is the practice of judges empowering private parties in a case like this one to *extinguish* the legal claims of absent persons before those claims have accrued.

Such concerns have led a number of commentators to argue that the difficulties inherent in analyzing the interests of those who do not yet know that they are injured, and particularly in notifying them of their rights, should preclude *all* class action settlements that seek to bind such persons.[35] Such an outcome is certainly one

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[34] A hypothetical claim, like those of petitioners' in 1984, *see* note 10, *supra*, would appear not to have a "high degree of immediacy," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992), nor to be "certainly impending"; rather, such a claim seems merely "abstract" and too "conjectural or hypothetical" to confer standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotes and citations omitted).

[35] *See, e.g.*, 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Action* § 17.39, at 17-119 (3d ed. 1992) ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for his mass tort has been permitted to be maintained an adjudicated as a class action. Those unaccrued future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples."); Elizabeth R. Kaczynski, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85

option for this Court's consideration that the principal attraction of the instant case is that it presents a significant vehicle for any range of holdings — even [illegible] in this Court's first consideration of the problem [illegible], absent plaintiffs who lack present awareness of any injustice.

The basic due process requirements on which this Court has insisted for Rule 23(b)(3) class actions for money damages have been adequate representation, notice, and a chance to opt out. This Court has long held that, in general, "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). In class actions "the Due Process Clause of course requires that the named plaintiff at all times *adequately represent* the interests of the absent class members." *Phillips [illegible] Shutts*, 472 U.S. 797, 812 (1985) (emphasis added).

Additionally, a class [illegible] not binding on absent class members unless each [illegible] member receive[s] *notice* plus an opportunity to be heard and participate in the litigation." *Shutts*, 472 U.S. at 812 (emphasis added); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 314-315, 319 (1950) (requiring "notice reasonably certain to reach most of those interested in objecting"). Moreover, due process requires that each absent plaintiff be permitted to opt out of the class. *Shutts*, 472 U.S. at 812.[36]

On the record of this case, *all* these procedural protections were denied. The named plaintiffs to the 1984 *Agent Orange* litigation,

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COLUM. L. REV. 397, 398 n.7 (1985) (the "future members cannot be included in (b)(3) actions.") *Cf.* Marck C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 J. OF L. REFORM 374, 374 (1988) ("problem with [Rule 23] is that this binding res judicata effect extinguishes the class member's cause of action, yet there is no assurance that the class member will ever have heard about the action, much less have had influence over its litigation").

[36] Such notice and opt-out rights are critical because they "protect [each] claimant's right to control her litigation." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1 (1986). *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (holding that the right to use adjudicative procedures is a species of property protected by the due process clause).

who agreed to the ultimate settlement, all had already suffered "severe and permanent disabling injuries." *See* p. 5, *supra*. These plaintiffs were obliged to sue prior to the expiration of the applicable statute of limitations, despite the paucity of the scientific evidence then available. *See* p. 7 & note 9, *supra*. As the district court acknowledged, the interests of petitioners and others who in 1984 were not suffering from any injury, *see* note 10, *supra*, were directly adverse to "the interests of presently injured plaintiffs as well as defendants in achieving a settlement." **A58**.

The named plaintiffs made no effort to notify absent persons who were not suffering from injury. Rather, over defendants' objection, they and the district court defined, and directed notice to, a class consisting *only* of persons who subjectively believed that they were suffering compensable injuries as a result of Agent Orange. *See* pp. 5-6 & note 5, *supra*. Then, once the opt-out deadline had passed, the named plaintiffs vastly expanded the class that would be bound, to include anyone who might *ever* manifest any injury in the future. *See* pp. 6-7, *supra*. Conceivably, the settlement agreement might have expressly *preserved* the claims of these future plaintiffs; instead, it abolished them. The district court's explanation for the parties' contractual agreement to extinguish the rights of hundreds of thousands of people, none of whom was at the bargaining table, was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." **A35**. No notice and opt out rights for the new class members were even considered.

Thus, petitioners were denied *all* of the bedrock requirements of Rule 23 and due process at the hands of private parties who negotiated to extinguish petitioners' legal claims before they had even accrued. This "might in another context be a bureaucratic success story," but here it has "serious constitutional ramifications." *Morrison v. Olson*, 487 U.S. 654, 684 (1988).

The Second Circuit was likewise unwilling to enforce the minimum procedural guarantees applicable in the class action context. Despite the conflict of interest that the district court had candidly acknowledged, **A58**, the court below dismissed any concern here, with the assertion that harm from any conflict had "never materialized." *See* p. 10, *supra*. And in a bizarre reading of this Court's decision in *Shutts*, the court below opined that, as long as absent plaintiffs are *unknown*, a court may dispense with

notice and opt-out rights entirely if it deems the benefits of these core protections to be "conjectural" and outweighed by "society's interest" in resolving complex litigation. *See id.*

The Second Circuit's focus on "society's interest" and its disregard for individual procedural guarantees may be acceptable in the legislative arena but cannot be squared with the functioning of a life-tenured judiciary. *Cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 444-45 (1915) ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"). As Judge Patrick Higginbotham cautioned in a similar context, in invalidating an innovative quasi-administrative scheme for trying asbestos cases: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

Thus, at its root, the second question in this case presents the Court with an opportunity to insist that the lower courts apply traditional Rule 23 and due process analysis to the unaccrued future claims of absent plaintiffs, and an opportunity to reject the sort of quasi-legislative analysis relied on by the Second Circuit.

CONCLUSION

For all these reasons, certiorari should be granted.

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November 24, 1993

APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, affirming the district court's refusal to remand the case and its dismissal of petitioners' claims, dated June 24, 1993 . . . . . A1

APPENDIX B

Decision of the United States District Court for the Eastern District of New York, refusing remand and dismissing petitioners' claims, dated October 4, 1991 . . . . . A26

APPENDIX C

Decision of the District Court denying Rule 59 motion for reconsideration except in part, and denying motion under 28 U.S.C. § 455(a), dated November 12, 1991 . . . . . A60

APPENDIX D

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APPENDIX E

Text of Federal Rule of Civil Procedure 23 . . . . . A64

APPENDIX F

Affidavits of Shirley Ivy, dated February 22 and 27, 1991 . . . . . A68

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 92-7537, 92-7573, 92-7575

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION,

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, Individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; EARL THOMPSON; JUDY L. THOMPSON; JAMES DONALD DELOATCH; JOYCE DELOATCH; PEGGY SANDS, Individually and as Representative of the Estate of Martin Sands, Deceased; EMILE ANNIBOLLI; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY; LAURA JENKINS, Individually and as Representative of the Estate of Eddie Jenkins, Deceased; RONALD L. HARTMAN, KATHERINA H. HARTMAN, and as Next Friend to JEFFERY ALAN HARTMAN and ANGELA MARIE HARTMAN, Both minors individually and as Representative of those similarly situated,

Plaintiffs-Appellants,

JAMES WHITE, Individually and as Representative of the Estate of Clarence White, Deceased; CHARLES BROWN,

Plaintiffs-Appellants,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, also known as Diamond Shamrock Refining & Marketing Company, also known as Occidental Electro Chemical Corporation, also known as Maxus Energy Corp., also known as Occidental Chemical Corporation, also known as Diamond Shamrock Co.; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of New York

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JUNE 24, 1993

Before: VAN GRAAFEILAND, KEARSE and CARDAMONE,

Circuit Judges.

VAN GRAAFEILAND, *Circuit Judge*:

Two groups of veterans and their family members, who sue both individually and on behalf of others similarly situated, appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, J.) dismissing their tort claims against seven chemical companies which manufactured the defoliant Agent Orange. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 902 (E.D.N.Y. 1991). In addition to their claim of

substantive error, appellants contend that the district judge erred in refusing to remand their cases to the state court from which they were removed and in denying their motion that he disqualify himself for conflict of interest or appearance of partiality. For the reasons that follow, we affirm.

These actions are an attempted revival of the massive tort litigation (collectively "*Agent Orange I*"), which arose from the United States Armed Services' use of Agent Orange during the Vietnam War. Because both the history of the litigation and the background of the instant actions have been chronicled in the opinion below, 781 F.Supp. at 904-14, a brief summary will suffice for present purposes.

While serving in Vietnam, several hundred thousand soldiers were exposed to Agent Orange, which contained traces of the chemical 2,3,7,8-tetrachlorodibenzo-p-dioxin ("dioxin"). Following their return home, many veterans complained of illnesses, which they attributed to this exposure. In 1978, these veterans began to seek redress through the courts, suing both the United States and the manufacturers of Agent Orange.

In 1979, the Judicial Panel on Multidistrict Litigation consolidated hundreds of the cases and transferred them to the Eastern District of New York. Subject matter jurisdiction over these cases originally was based on the asserted existence of a question of federal common law, but, after we reversed on this issue, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), jurisdiction was found to exist on the basis of diversity of citizenship.

In December 1983, the district court certified a Rule 23(b)(3) "common question" class with opt-out rights in order to address the common issues of general causation and the military contractor defense, and a Rule 23(b)(1)(B) "limited fund" class for punitive damage claims. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). The Rule 23(b)(3) class was defined as:

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Notice was provided to class members by mail where feasible and by advertisements in the print and broadcast media. *Id.* at 729-30. The deadline to opt out of the Rule 23(b)(3) class was May 1, 1984; 2,440 potential plaintiffs opted out by the deadline, although all but 282 eventually opted back into the class.

A tentative settlement was reached on May 7, 1984, the day the trial was scheduled to begin. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising out of Agent Orange exposure, and a claim against this fund was made the exclusive remedy for all class members. A $10 million reserve was created to indemnify the defendants for any state court judgments obtained by class members. The Settlement Agreement stated that "[t]he Class specifically includes persons who have not yet manifested injury," and it forever barred class members from instituting or maintaining an action against defendants based on exposure to Agent Orange. *See* 597 F.Supp. 740, 862-66 (E.D.N.Y. 1984) (reprinting Settlement Agreement).

The settlement was approved on September 25, 1984 after extensive, nationwide fairness hearings, *see id.* at 740-862, and the approval was reaffirmed on January 7, 1985, *see* 611 F.Supp. 1296, 1347. On July 9, 1985, the district court granted an order directing consummation of the settlement "in accordance with its terms," dismissing all class members' claims, permanently barring class members from instituting or maintaining future actions arising from Agent Orange exposure, and retaining jurisdiction over the maintenance, administration

and distribution of the settlement fund. 618 F.Supp. 623, 624-25 (E.D.N.Y. 1985). The court also granted summary judgment against the opt-out plaintiffs based on their failure to prove causation and on the military contractor defense. 611 F.Supp. 1223 and 1267 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). We affirmed the certification, maintenance and settlement of the class action in all significant and relevant respects. 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

The final distribution plan for the settlement fund was announced on July 5, 1988 following the termination of all appeals. 689 F.Supp. 1250. Roughly three-fourths of the fund, which by then had grown to approximately $240 million, was allocated to the Agent Orange Veteran Payment Program. This Program provides payments on the death or disability of class members. By September 30, 1991, it had disbursed over $86 million and had processed more than fifty thousand claims. Twenty-eight percent of the disability claims processed by the fund were for disabilities manifesting themselves after May 7, 1984; more than half of the death claims were for deaths occurring after May 7, 1984. 781 F.Supp. at 910. By September 30, 1992, the Payment Program had disbursed more than $146 million to disabled veterans or their survivors and had processed more than sixty thousand claims. *Report of the Special Master on the Distribution of the Agent Orange Settlement Fund*, Fourth Annual Report, at 11-12.

Most of the remaining quarter of the settlement fund was allocated to the Agent Orange Class Assistance Program ("AOCAP"), which made grants to agencies serving Vietnam veterans and their families. Among the activities assisted by those grants were veteran counselling, aiding the obtaining of Government veterans' benefits, and administering training programs for agencies dealing with Vietnam veterans and their employees. As of September 31, 1992, AOCAP had awarded roughly $33.6 million in grant funds, benefitting more than 101,000 veterans and family members nationwide. *See* Fourth Annual Report, *supra*, at exh. D. That portion of the $10 million indemnity

reserve that will not have been used to satisfy state court judgments by 1994 will revert to this fund. Originally, the district court provided for management of the AOCAP fund by an independent foundation. We reversed on this point and ordered that Judge Weinstein maintain direct oversight of the Program. 818 F.2d 179, 184-86 (2d Cir. 1987). In managing AOCAP, Judge Weinstein consults with an advisory board of Vietnam veterans.

In 1989 and 1990, two overlapping class actions, *Ivy v. Diamond Shamrock Chemicals Co.* and *Hartman v. Diamond Shamrock Chemicals Co.*, were brought in Texas courts. Both alleged that the named plaintiffs or their family members suffered injury as a result of Agent Orange exposure and that the injuries sustained by these plaintiffs did not manifest themselves or were not discovered until after May 7, 1984, the *Agent Orange I* settlement date. Both complaints sounded exclusively in state law and explicitly abjured reliance on federal law. Defendants removed the cases to the United States District Court for the Eastern and Southern Districts of Texas, alleging "artful pleading" of a federal claim or, alternatively, complete federal preemption. The Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of New York.

On January 31, 1990, the *Ivy* plaintiffs petitioned this court for a writ of mandamus directing remand. On March 28, we denied the motion, ruling that the question of subject matter jurisdiction should be decided in the first instance by the district court. *In re Ivy* , 901 F.2d 7, 10 (2d Cir. 1990). Plaintiffs then moved in the district court for remand of both cases. The district court heard oral argument on March 6, 1991, and scheduled an additional hearing on the motion to remand and other motions for May 6, 1991, to allow for further briefing. In the interim, defendants moved to dismiss and to amend their notice of removal to assert federal officer removal pursuant to 28 U.S.C. § 1442(a)(1).

The district court remanded the claims of two civilian plaintiffs alleging injury, holding that they were not within the

Agent Orange I class and that federal officer removal was inapplicable. *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992). The court denied the motion to remand of the veteran plaintiffs and their family members and dismissed their claims as barred by the *Agent Orange I* settlement and the court's order enjoining future suits by class members. 781 F.Supp. 902, 918-20. Plaintiffs moved for reconsideration of the latter decision and for disqualification of Judge Weinstein pursuant to 28 U.S.C. § 455. The court, in an unpublished order, denied both motions and kept its original decision substantially intact.

FEDERAL JURISDICTION

As a general rule, a state case may be removed to federal court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This rule is not satisfied with respect to the complaints herein. There is no complete diversity of citizenship, and no federal issue is apparent in the complaints. Indeed, the complaints explicitly disclaim reliance on federal law. Accordingly, in order to be removable, the *Ivy* and *Hartman* cases must fall within an exception to the "well-pleaded complaint" rule. The district court asserted two such exceptions -- plaintiffs' "artful pleading" of a federal question, and the court's residual authority under the All Writs Act to preserve its jurisdiction. We address these in order.

Ordinarily, a plaintiff is master of his complaint and may elect to proceed solely under state law even if federal remedies are available. *See Caterpillar*, *supra*, 482 U.S. at 392; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, (1913). However, a complaint which appears to be grounded solely in state law actually may be federal in nature, and thus removable, if its true nature has been disguised by the plaintiff's artful pleading. *See generally* 14A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3722, at 266-75 (2d ed. 1985). Because state and federal laws have many overlapping or even identical remedies and because generally we respect a plaintiff's

choice between state and federal forums, this exception to the well-pleaded complaint rule is necessarily a narrow one.

The district court justified removal in the instant case on the authority of *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2, (1981), as interpreted by *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), *cert. denied*, 479 U.S. 885, (1986). Under *Sarkisian's* interpretation of *Moitie*, a state law claim is an artfully-pleaded federal claim if (1) the plaintiff previously had elected to proceed in federal court on a claim expressly grounded on federal law and (2) the elements of the subsequent state law claim are virtually identical to those of the claim previously made. *Id.* However, the instant case was not removable under the *Sarkisian* test, because the prior claim was not expressly grounded on federal law but instead was a diversity claim based on general tort law. The district court interpreted *Sarkisian* to require only that "the elements of the [subsequent] claim . . . be 'virtually identical' to those in the prior federal action," stating that "there is no indication that the Court of Appeals intended to . . . limit its reach" to those cases where the prior federal court action was based on federal question jurisdiction. 781 F.Supp. at 917. This was a misreading of *Sarkisian*, which explicitly requires that the prior claim be "expressly grounded on federal law." 794 F.2d at 760; *see also Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1414-17 (9th Cir. 1990).

Alternatively, the district court found authority for removal in its power under the All Writs Act to issue writs "necessary or appropriate" in aid of its jurisdiction. 28 U.S.C. § 1651. Here, the district court was on sounder ground. A district court, in exceptional circumstances, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

If Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the *Agent Orange*

I settlement mechanism would be substantial. The parties to the settlement implicitly recognized this when they agreed that all future suits by class members would be permanently barred. It is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement. The court best situated to make this determination is the court that approved the settlement and entered the judgment enforcing it. Removal in the instant case was an appropriate use of federal judicial power under 28 U.S.C. § 1651. *See United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863-64 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.

Appellees contend that the instant case was removable pursuant to 28 U.S.C. § 1442(a), which in pertinent part allows removal of actions against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." Although appellees sought to amend their notice of removal to assert this as an additional basis for removal, the district court did not rule on their application to

amend. Because our decision is supported on other grounds, we too decline to reach this question.

Appellants' additional arguments against the district court's assumption of jurisdiction are not persuasive. They contend, for example, that removal in the instant case violates the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits a federal court from "grant[ing] an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This contention is without merit. Assuming without deciding that removal of a case from state court to federal court is sufficiently akin to an injunction to come within the Act's ambit, the facts of the instant case bring it squarely within the above-mentioned exceptions to the Act. First, the district court's removal was "necessary in aid of its jurisdiction." Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, *see* 818 F.2d at 184-86; 618 F.Supp. at 625, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974). "In a class action, the district court has a duty to class members to see that any settlement it approves is completed, and not merely to approve a promise . . ." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985). Second, removal was needed "to protect or effectuate" the district court's *Agent Orange I* judgment. This exception in the statute authorizes a federal court to proscribe state litigation of an issue that actually has been previously presented to and decided by the federal court. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). A review of the arguments, orders and judgment in *Agent Orange I* makes it crystal clear that the court in fact did determine the central issue of class membership raised here, i.e., that persons who had yet to manifest injury were class members. *See, e.g.*, Settlement Agreement ¶ 8, 597 F.Supp. at 865 ("The Class specifically includes persons who have not yet manifested injury.").

Appellants contend that *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny, particularly *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), require that the district court abstain from exercising jurisdiction in deference to the Texas state courts. This argument stands the *Younger* doctrine on its head. *Younger* teaches us to recognize the interest of the states in protecting the authority of their judicial system so that their orders and judgments are not rendered nugatory. *Pennzoil, supra*, 481 U.S. at 14 n.12 (quoting *Juidice v. Vail*, 430 U.S. 327, 336 (1977)). The application of *Younger*, as advocated by appellants, would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments. This result is not the sort of federal-state comity envisioned in *Younger* and *Pennzoil*. *See Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977).

Appellants also assert that the district court did not have personal jurisdiction over them. This argument is frivolous. *See* 818 F.2d at 163. Likewise, there is no merit in their argument that removal in these cases interferes with their right to collaterally attack the *Agent Orange I* judgment by denying them the forum of their choice. Although appellants' attack is founded on their constitutional right to due process, nothing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch it. While the law as a general rule permits a plaintiff to choose his forum, that freedom is not absolute, as the removal, venue and multidistrict litigation statutes and the personal jurisdiction and *forum non conveniens* doctrines all demonstrate. It is obvious, from what presently is occurring herein, that the removal and multidistrict transfer in the instant case have not impinged unduly upon appellants' right of collateral attack.

CLASS MEMBERSHIP

Having resolved the preliminary jurisdictional questions, we turn to the central question of appellants' membership *vel non* in the *Agent Orange I* class. The answer to this question lies in the

meaning of the phrase "who were injured while in or near Vietnam from exposure to Agent Orange." Appellants contend that persons are not "injured" until medical symptoms become manifest. Appellees argue in response that injury occurs when a deleterious substance enters a person's body, even though its adverse effects are not immediately apparent. In the instant case, appellees' definition is correct.

The words "injury" and "injured" appear to have received the attention of courts and legislatures most often where limitation periods for suit are involved. For example, some authorities hold that the prescribed limitation period begins to run when one's personal physical rights are invaded; others hold that the limitation period does not begin to run until the hurt or damage resulting from the invasion is discovered. Absent a specific statutory mandate to the contrary, the definition of "injury" and "injured" generally remains the same regardless of which limitation period is applied; i.e., the limitation runs either from the time the "injury" occurs or the time the damage resulting from the "injury" is discovered. In the strict legal sense "'[i]njury' means a wrongful invasion of legal rights, and is not concerned with the hurt or damage resulting from such invasion . . . ." 43A C.J.S. *Injury* at 767; *see also Restatement (Second) of Torts* § 7.

In this respect, reference to the history of New York State's limitation period governing suits for personal injuries is illuminating. The traditional rule in New York is that the injury occurs and the limitation period begins to run when there is a wrongful invasion of one's personal rights, not when the damage allegedly resulting from the invasion is discovered. *See Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 300 (1936); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 781 (1979)(mem.).

Recognizing the possible adverse effect this traditional rule might have on veterans claiming injury from Agent Orange, the New York Legislature, in 1981, decided that such claims "should not be prohibited by the holding that a cause of action accrues, and the statute of limitations commences to run from the

'date of injury.' " *See Legislative Findings: Victims of Herbicide Agents*, Section 1 of L. 1981, c. 266, *eff.* June 16, 1981, *reprinted in* footnote to N.Y. Civ. Prac. L. & R. § 214-b (McKinney 1990). The Legislature therefore provided in section 214-b that a veteran's action to recover damages for "personal injury" caused by contact with or exposure to Agent Orange "while serving" in Indo-China between 1962 and 1975 may be commenced within two years from the date of discovery of "such injury." This enactment changed the onset of the limitation period; it did not change the meaning of the word "injury."

From the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this meaning and urged it repeatedly upon the district court. The initial class action complaint alleged that the action was brought on behalf of, among others, "those individual veterans manifesting no symptoms of illness and disease at present, but at risk of genetic and somatic damage." In response to the defendants' motion to dismiss the "at risk" claims, plaintiffs argued in both the district court and this court:

> The "injury" in the Agent Orange cases has already occurred. The plaintiffs "at risk" have already been exposed to the toxic substance.
>
> * * *
>
> The at risk argument of the Defendant war contractors obscures the fact that every individual Plaintiff has been injured in fact . . . We have asked the Court to recognize that there is injury, in fact.
>
> * * *
>
> Judge, at the risk of delivering a short lecture on the medicine in this case, the exposure to the toxicant produced a physiological event, an injury within the meaning of the word "injury" in the technical law of torts.

The district court was fully aware of the New York Legislature's use of the term "personal injury" in section 214-b and its legislative preamble. *See* 597 F.Supp. at 810-11. In response to plaintiffs' urging, it adopted and approved similar usage in the Settlement Agreement and the judgment that incorporated it. *See id.* at 879, 870. There thus can be no question concerning the district court's intent or that of the parties to the Settlement Agreement. "At risk" veterans, i.e., victims with no visible symptoms, were included in the plaintiff class.

In our prior opinion affirming the class settlement, 818 F.2d 145, we recognized the propriety of this inclusion, because the military contractor defense was common to all of the plaintiffs' cases and, if successfully interposed, "would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncracies of their claims." *Id.* at 167. Appellants' arguments against class membership are no stronger now than they were when made in 1987.

Appellants' contention that they could not have been within the *Agent Orange I* class at the time of settlement because they did not have an "injury in fact," suggests a different meaning of that term than has been enunciated in numerous cases involving liability insurance coverage for injuries such as those sustained by appellants. Although the issue in the insurance cases is liability rather than jurisdiction, the controversy over the meaning of the term "injury in fact" is subject to judicial resolution in much the same manner as it is in the instant case. Thus, in *American Home Prods. Corp. v. Liberty Mutual Ins. Co.*, 748 F.2d 760 (2d Cir. 1984), we said that "[s]ome types of injury to the body occur prior to the appearance of any symptoms; thus, the manifestation of the injury may well occur after the injury itself." *Id.* at 764. We rejected the argument appellants now make that "injury in fact" means injury that is manifest, diagnosable or compensable. *Id.* at 764-65. *See also Aetna Casualty & Surety Co. v. Abbott Laboratories Inc.*, 636 F.Supp. 546, 548-49 (D. Conn. 1986).

In *Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368 (E.D.N.Y. 1988), the issue before the court was whether Uniroyal was entitled to reimbursement from Home for Uniroyal's contribution to the *Agent Orange I* settlement. Apropos of the issue now before us, Judge Weinstein wrote:

> In this case there can be no doubt when the injury must be deemed to have taken place. The parties stipulated that any injury from exposure to Agent Orange took place "at or shortly after a serviceman's exposure to Agent Orange spraying."
>
> The force of the Olson Affidavit and the stipulation is to determine, for the purposes of this insurance litigation, that injury in fact took place within a week or so of spraying.

Id. at 1389. Although this decision is not binding in the instant case, its conclusion that plaintiffs sustained an "injury in fact" is eminently correct. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978).

Appellants' argument that they could not have been members of the *Agent Orange I* class because their claims did not satisfy the $10,000 amount-in-controversy requirement of 28 U.S.C. § 1332 as it then existed, was rejected by this court on the original *Agent Orange I* appeal, 818 F.2d at 163. We there said, quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938):

> [U]nless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

We followed the same reasoning in *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 734 (2d Cir. 1992), despite the fact that the amount-in-controversy requirement had been raised by then to $50,000. Further repetition of this rule is unnecessary.

We are satisfied that appellants' *Agent Orange I* claims, made in good faith, satisfied the monetary jurisdiction requirements.

Appellants next contend that they are not bound by the *Agent Orange I* class action and settlement because the court did not have personal jurisdiction over them. We rejected this argument on the appeal in *Agent Orange I*, 818 F.2d at 163. We there quoted the Judicial Panel on Multidistrict Litigation to the effect that transfers under 28 U.S.C. § 1407, the multidistrict litigation statute, "are simply not encumbered by considerations of in personam jurisdiction and venue" and that the transferee judge has all the pretrial jurisdiction the transferor judge would have had if the transfer had not occurred. We then proceeded in that opinion to discuss the adequacy of notice of the class action and proposed settlement, *id.* at 167-70, and held that the notices were adequate. Our view has not changed.

Appellants contend, as did appellants in *Agent Orange I*, that all class members did not receive adequate notice of their membership in the *Agent Orange I* action and the opportunity to exclude themselves therefrom. This, appellants allege, was a due process violation under the standards of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Appellants misapprehend the reach of *Shutts*. The Court's decision in that case "is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominantly for money judgments," and "intimates no view concerning other types of class actions." *Id.* at 811 n.3. As such, "*Shutts* does not apply directly to classes of unknown plaintiffs." *See* 1 *Newberg on Class Actions* § 1.23, at 1-54 (3d ed. 1992). We distinguished *Shutts* in *Agent Orange I*, pointing out that here "there was no easily accessible list of veterans, as there must have been of royalty holders in [*Shutts*]." 818 F.2d at 169.

We again decline to extend the *Shutts* holding into situations such as this. "Due process, the courts have often declared, 'is a flexible concept,' intended to ensure 'fundamental fairness.'" *In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305,

320 (1985) and *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)), *cert. denied*, 493 U.S. 959 (1989). What process is due in a given instance requires the balancing of a variety of interests. In some cases, "the marginal gains from affording an additional procedural safeguard . . . may be outweighed by the societal cost of providing such a safeguard." *Walters*, *supra*, 473 U.S. at 320-21.

In the instant case, society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. As appellants correctly note, providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good. Their rights are better served, we think, by requiring that "fair and just recovery procedures be[] made available to these claimants," 1 *Newberg*, *supra*, § 1.23, at 1-56, and by ensuring that they receive vigorous and faithful vicarious representation.

It is axiomatic that a class action binds absent members only so long as they were adequately represented therein. *See generally Hansberry v. Lee*, 311 U.S. 32, 41 (1940). Our decision in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), describes the requisites of adequate representation as follows:

> [A]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation. Additionally, it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.

Id. at 562. Appellants do not challenge the qualifications of the *Agent Orange I* class counsel. Moreover, their conflict-of-interest claims are unpersuasive. Although, as the district court noted, "[o]ne can imagine many genuine conflicts of interest" in a situation such as this, the court concluded that any potential

conflicts that might have infected *Agent Orange I* never materialized:

> In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment Fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

781 F.Supp. at 919.

We agree with the district court that designation of a subclass of future claimants and appointment of a guardian to represent their interests was unnecessary "because of the way [the settlement] was structured to cover future claimants." *Id.* As Judge Weinstein noted in one of the fairness hearings that he conducted:

> to appoint another attorney to represent that sub-group would just, in my opinion, increase the amount of legal fees, which is what all of us want to keep to a bare minimum. There are lots of arguments and classes and sub-classes, but if we appoint attorneys and guardians ad litem for everybody who might have . . . somewhat of a conflict of interest, there is hardly going to be any money left for the veteran.

Appellants' blanket allegation that the *Agent Orange I* settlement was collusive is patently frivolous. When appellants' counsel was pressed at oral argument to indicate some factual support for the allegation, he was unable to do so. Indeed, when one reads contemporaneous accounts of the settlement negotiations, which we described as having been "dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining," 818 F.2d at 166, it is impossible to envision any collusion between plaintiffs and defendants. By all accounts, the

negotiations were arm's-length and adversarial, even fierce. *See generally* Peter H. Schuck, *Agent Orange on Trial* 143-67 (1986); Francis J. Flaherty & David Lauter, "Inside Agent Orange: The 11th-Hour Talks that Almost Failed," *Nat'l L.J.*, May 21, 1984, at 1; Ralph Blumenthal, "How Judge Helped Shape Agent Orange Pact," *N.Y. Times*, May 11, 1984, § A at 1.

Appellants mistakenly attempt to create an inference of impropriety out of our characterization of the $180 million settlement as "essentially a settlement at nuisance value." 818 F.2d at 171. Assuming the correctness of our characterization, it is in no way indicative of any improper collaboration between class representatives and the chemical company defendants. It was instead a reflection of the "formidable hurdles" plaintiffs faced. As we went on to conclude, plaintiffs' counsel "had good reason to view this case as having only nuisance value." *Id.*

Indeed, we note that, despite some intervening changes in the law, serious obstacles to recovery remain. Thus, although the scope of the government contract defense has been somewhat limited by the Supreme Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), under proper circumstances the defense is still available to government contractors. *See Lewis v. Babcock Indus., Inc.*, 985 F.2d 83 (2d Cir. 1993); *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.), *cert. denied*, 112 S.Ct. 584 (1991); *Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67 (3d Cir. 1990). There is more than a mere possibility that such circumstances exist in the instant case. It is clear from the chemical companies' contracts with the Government that the Government specified Agent Orange's ingredients in great detail. There also is documentary evidence tending to show that the Government strictly prescribed the markings on Agent Orange barrels, and prohibited all extraneous label information, including warnings. Finally, there is evidence that the Government's knowledge of the hazards of Agent Orange and dioxin was at least as great as that of the chemical companies, making it unlikely that there were "dangers . . . that were known to the supplier but not to the United States," of

which the suppliers should have warned. Boyle, *supra*, 487 U.S. at 512. In sum, although the availability of the government contract defense might not be a foregone conclusion, there is a reasonable probability that it would apply, barring any recovery by the plaintiffs.

In addition, despite continuing research, the crucial issue of "general causation," i.e., whether any injuries are attributable to Agent Orange, remains unsettled. As one 1992 commentator noted, reviewing the scientific literature: "To date, there has been no conclusive evidence that exposure to Agent Orange is carcinogenic, mutagenic or teratogenic in humans. Furthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported." 13B Arthur L. Frank, *Courtroom Medicine: Cancer*, § 25A.00, at 25A-4 (1992).

Indeed, it remains as difficult as ever to prove individual levels of exposure to Agent Orange. For instance, a 1990 study conducted under the auspices of the Environmental Protection Agency and the Veterans Administration compared Vietnam veterans to veterans not serving in Vietnam and civilian men, all of like age, and concluded that:

> with or without adjustment for several demographic variables, the mean level of [dioxin] in the adipose tissue of the 36 Vietnam veterans was not significantly different from that of the 79 non-Vietnam veterans or the 80 civilian men. . . . Furthermore, the results showed no association between [dioxin] levels and any estimate of Agent Orange exposure opportunity based on military records. . . . The study results suggest that heavy exposure to [dioxin] for most Vietnam veterans was unlikely and that available military unit records used in the study were inadequate in assessing exposure to Agent Orange for those Vietnam veterans.

Han K. Kang *et al.*, *Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls*, at x (1990).

Even if appellants were to surmount the military contractor defense, provide satisfactory epidemiological evidence on the issue of general causation, and demonstrate with sufficient accuracy their levels of personal exposure to Agent Orange, they still would face the difficult task of demonstrating individual causation, i.e., that Agent Orange exposure caused the particular illnesses upon which they base their claims. Unlike asbestos, dioxin has not been recognized as the source of a distinctive medical illness.

The lesson to be drawn from this discussion is that the fundamental fairness of the *Agent Orange I* settlement remains unshaken. Notwithstanding the legal and scientific developments of the past nine years, the chances of recovery are nearly as speculative today as they were at the time of settlement. Appellants' challenges to the adequacy of their representation therefore must be rejected.

In so holding, we do not denigrate the importance of qualified and faithful class representation. The quality and fidelity of counsel are of paramount importance in class actions such as the instant one which involve unknown claimants. Indeed, we ordinarily would anticipate the appointment of a guardian to represent the interests of absent claimants, particularly those with questionable injuries. In the instant case, however, we are not writing on a clean slate. The unique circumstances surrounding *Agent Orange I* — in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now — rendered additional protections unnecessary. The representation in *Agent Orange I* was more than adequate to protect appellants' interests.

Once all of the foregoing issues are resolved in favor of appellees, resolution of the case is relatively straightforward. Both the Settlement Agreement, and the district court's judgment dismissing the cases, explicitly and permanently barred future actions by class members against the defendants:

> All complaints in this class action, and all claims of each and every plaintiff and member of the Rule 23(b)(3) class, are hereby dismissed on the merits, with prejudice . . . .
>
> . . . .
>
> Each and every plaintiff and member of the Rule 23(b)(3) class is hereby forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of any of the complaints in this class action.

618 F.Supp. at 624.

> Defendants . . . are not, and in the future shall not be, subject to liability or expense of any kind to any member of the Class in respect of any claim arising out of the subject matter of the Complaint. . . . Claims against the Fund shall be the exclusive remedy of all Class members against the defendants . . . and all members of the Class are forever barred from instituting or maintaining any action against any of the defendants . . . arising out of or relating to, or in the future arising out of or relating to, the subject matter of the Complaint.

Settlement Agreement ¶ 5, 597 F.Supp. at 864. Because appellants are properly within the *Agent Orange I* class, these provisions are binding on them, and their suits were properly dismissed. The *Agent Orange I* settlement mechanism constitutes appellants' sole source of relief.

We are not persuaded by appellants' argument that the $10 million indemnity provision for state law judgments evidences a different intent. When the Settlement Agreement is read in its entirety, it is apparent that the indemnity provision was intended to protect the defendants against claims by those plaintiffs who opted out of the class and could sue separately in state court.

Appellants' final argument, raised for the first time after the court's initial decision below, is that Judge Weinstein should have disqualified himself for conflict of interest or appearance of partiality. Appellants contend that Judge Weinstein is a "fiduciary" of AOCAP, and thus has a conflict of interest requiring disqualification under 28 U.S.C. § 455(b)(4). In relevant part, section 455(b)(4) requires a judge to disqualify himself if "he knows that he, individually or as a fiduciary, . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." The statute defines "fiduciary" as including "such relationships as executor, administrator, trustee, and guardian." 28 U.S.C. § 455(d)(3).

As principal support for their claim, appellants rely on *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the court held that disqualification was required because the trial judge was trustee of a college that stood to reap significant financial gains depending upon the outcome of the lawsuit. Appellants read *Liljeberg* too broadly. Although there are superficial similarities between *Liljeberg* and the instant case, there is one crucial difference. The fiduciary duty of the judge in *Liljeberg* was owed to a non-litigating entity, while Judge Weinstein's duty was part of his judicial obligation to litigating class members. A judge in a class action is obligated to protect the interests of absent class members. *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). Moreover, we specifically instructed Judge Weinstein to retain direct oversight of the Class Assistance Program fund. *See* 818 F.2d at 185-86. His legally-imposed duties *qua* judge with regard to the settlement funds are not a "fiduciary" obligation within the meaning of section 455(b)(4), and do not mandate disqualification from cases which may involve the fund. *See Commissioner v. Brown*, 380 U.S. 563, 571 (1965) ("[T]he courts, in interpreting a statute, have some 'scope for adopting a restricted . . . meaning of its words where acceptance of [a literal] meaning would lead to absurd results . . . .'" (quoting *Helvering v. Hammel*, 311 U.S. 504, 510 (1941)).

In addition to basing their argument on section 455(b)(4), appellants allege that Judge Weinstein's "fiduciary" obligation violates section 455(a), which requires disqualification whenever a judge's "impartiality might reasonably be questioned." This argument likewise lacks merit. Whether a judge has an appearance of partiality is determined from the viewpoint of a reasonable observer with knowledge of all surrounding circumstances. *Liljeberg*, *supra*, 486 U.S. at 860-61. In the instant case, a reasonable observer would not question the district court's impartiality. In managing AOCAP, Judge Weinstein is merely carrying out the supervisory duties assigned to him by the law of class actions in general, and by the orders of this court in particular.

Alternatively, appellants argue that Judge Weinstein has manifested an appearance of partiality mandating his disqualification under 28 U.S.C. § 455(a) based on his conduct in other cases. In essence, appellants accuse Judge Weinstein of possessing some traits of megalomania, of having a "systemic interest in retaining excessive judicial powers over mass tort cases," Br. at 49, in order to effect a "systematic denial of rights to toxic tort plaintiffs," Br. at 58, to "circumvent" various legal obstacles, Br. at 61, and to ensure that "other defendants . . . make settlements by which enormous sums will be turned over to the custody of the court for discretionary allocation," Br. at 57. These allegations, verging on the slanderous, are patently ridiculous and an affront to both the district court and this court. Appellants overlook the fact that we affirmed in all significant respects Judge Weinstein's purported use of "excessive judicial powers" in *Agent Orange I*. Moreover, we recently commended Judge Weinstein for his "innovations" and "innovative managerial skills" in such large-scale litigation. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 836 n.1 (2d Cir. 1992).

Even if appellants' section 455 arguments had some indicia of merit, they were not raised in a timely fashion. "It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining

knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). Apparently recognizing the problem created by their delay, appellants contend on appeal that Judge Weinstein's lack of qualifications were hidden until revealed by his decision now being appealed. That argument is ridiculous. Judge Weinstein's highly-visible role in managing the *Agent Orange I* settlement and his active participation in other mass tort actions have been disclosed and discussed time and again in the media and in publicly-available documents and cannot have come as a surprise to appellants. *See, e.g.*, Arnold H. Lubasch, "Jack Weinstein: Creative U.S. Judge Who Disdains Robe and High Bench," *N.Y. Times*, May 28, 1991, at B5; Francis J. Flaherty & David Lauter, "Judge's Novel Rulings Spurred Settlement," *Nat'l L.J.*, May 21, 1984, at 41; Ralph Blumenthal, "How Judge Helped Shape Agent Orange Pact," *N.Y. Times*, May 11, 1984, at A1.

In conclusion we summarize our holdings as follows: (1) the removal and transfer of these cases from Texas state court to the United States District Court for the Eastern District of New York was a proper exercise of federal judicial power under the All Writs Act, 28 U.S.C. § 1651, and the multidistrict litigation statute, 28 U.S.C. § 1407; (2) appellants are properly within the class certified in *Agent Orange I*; (3) as members of the *Agent Orange I* class, appellants are barred by the *Agent Orange I* judgment from instituting and maintaining the instant litigation, and the district court properly dismissed their claims; (4) Judge Weinstein's disqualification is not required.

The judgment of the district court is affirmed, and costs are awarded to appellees.

APPENDIX B

UNITED STATES DISTRICT COURT
For the Eastern District of New York

Nos. 79 Civ. 747, No. 89 Civ. 3361,
90 Civ. 3928, and MDL No. 381

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

In re "AGENT ORANGE" Product Liability Litigation;

SHIRLEY IVY, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

RONALD L. HARTMAN, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

OCTOBER 4, 1991

JUDGE: Jack B. Weinstein, United States District Judge.

WEINSTEIN, District Judge:

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Plaintiffs consist of two groups: first, those veterans and family members within the class covered by the *Agent Orange* class action pending in this court, and second, civilians claiming

injury from Agent Orange who were never members of the class. Defendants are the same as those in the class action.

The current suits began as state court actions in Texas. They were removed to the federal court in Texas and then transferred by the Multidistrict Panel to the Eastern District of New York. Plaintiffs now seek to remand their actions to Texas state court for lack of federal subject matter jurisdiction. Defendants move to dismiss plaintiffs' claims or for an injunction prohibiting plaintiffs from continuing their actions.

As explained in this memorandum, the plaintiffs who are members of the *Agent Orange* class must have their suits dismissed; they are free to share in the proceeds of the class action settlement to the extent they can demonstrate entitlement under the distribution plans being administered by the court. As it pertains to the civilian plaintiffs — who are not members of the class — the plaintiffs' motion to remand raises issues concerning the scope of 28 U.S.C. § 1442(a)(1) that require further consideration. These issues will be addressed in a separate memorandum.

I. INTRODUCTION

A. *Agent Orange Litigation: 1979-1984*

The current controversy is part of a continuing litigation whose first phase ended in settlement after six years of effort by scores of lawyers and many court officers -- special masters, magistrates, and judges. Among the hundreds of published and unpublished decisions, *see In re "Agent Orange" Prod. Liab. Litig.*, 475 F.Supp. 928 (E.D.N.Y. 1979) (dismissing federal constitutional and statutory claims, reserving possible federal common law claims, denying motion to limit communications to third parties); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 737 (E.D.N.Y. 1979) (finding subject matter jurisdiction on basis of federal common law issues), *rev'd*, 635 F.2d 981 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128, 102 S.Ct. 980 (1981); *In re "Agent Orange" Prod. Liab. Litig.*, 28 Fed. R. Serv. 2d

(Callaghan) 993 (E.D.N.Y. 1980) (granting motion of terminally ill plaintiff to videotape his own deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 750 (E.D.N.Y. 1980) (ordering government to refrain from destruction of documents pursuant to internal procedure); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 753 (E.D.N.Y. 1980) (various orders concerning modification of complaint and answers); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 754 (E.D.N.Y. 1980) (ordering videotaped deposition); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 756 (E.D.N.Y. 1980) (establishing agenda for status conference); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 757 (E.D.N.Y. 1980) (requiring plaintiffs to file individual notices to retain right to bring actions against federal government); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F.Supp. 762 (E.D.N.Y. 1980) (dismissing claims against government as third-party defendant, establishing case management plan, conditionally certifying Rule 23(b)(3) class, and denying defendants' motion for summary judgment); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 616 (E.D.N.Y. 1981) (establishing committee to review procedures for videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 91 F.R.D. 618 (E.D.N.Y. 1981) (allowing motion to amend caption, denying motion to amend complaint, denying defendants' motion for summary judgment on "government contractor" defense); *In re "Agent Orange" Prod. Liab. Litig.*, 93 F.R.D. 514 (E.D.N.Y. 1982) (allowing defendant to proceed with scheduled destruction of documents); *In re "Agent Orange" Prod. Liab. Litig.*, 534 F.Supp. 1046 (E.D.N.Y. 1982) (denying reargument on dismissal of government as third-party defendant, denying interlocutory appeal, provisionally dismissing claims against non-manufacturer defendants, denying motion to form steering committee for plaintiffs' counsel, denying motion for decertification of class, deferring decision on statute of limitations issues, and establishing elements of government contractor defense); *In re "Agent Orange" Prod. Liab. Litig.*, 537 F.Supp. 977 (E.D.N.Y. 1982) (provisionally dismissing claims against non-manufacturer defendant); *In re "Agent Orange" Prod. Liab. Litig.*, 94 F.R.D. 173 (E.D.N.Y. 1982)

(appointing special master to supervise discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 544 F.Supp. 808 (E.D.N.Y. 1982) (denying motion to disqualify defense attorneys; provisionally dismissing claims against certain non-manufacturer defendants, and denying motion to implead suppliers); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 191 (E.D.N.Y. 1982) (clarifying that denial of motion to implead suppliers was without prejudice); *In re "Agent Orange" Prod. Liab. Litig.*, 95 F.R.D. 192 (E.D.N.Y. 1982) (affirming special master's ruling as to location of depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 578 (E.D.N.Y. 1983) (adopting special master's protective order for discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y. 1983) (rejecting first amendment challenge to protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 587 (E.D.N.Y. 1983) (adopting with modifications special master's order regarding videotaped depositions); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting protective order); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 424 (E.D.N.Y. 1983) (adopting special master's protective order for Department of Agriculture documents); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427 (E.D.N.Y. 1983) (adopting special master's procedures for discovery of documents possibly subject to executive privilege); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 541 (E.D.N.Y. 1983) (denying interlocutory appeal of decision deferring certification of class and determination of appropriate notice); *In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 542 (E.D.N.Y. 1983) (affirming special master's denial of discovery request); *In re "Agent Orange" Prod. Liab. Litig.*, 565 F.Supp. 1263 (E.D.N.Y. 1983) (granting summary judgment for four defendants on government contractor defense; denying summary judgment for other defendants); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 522 (E.D.N.Y. 1983) (adopting order of special master concerning discovery of government documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 539 (E.D.N.Y. 1983) (adopting special master's order to unseal documents in connection with summary judgment motions); *In re*

"Agent Orange" Prod. Liab. Litig., 98 F.R.D. 554 (E.D.N.Y. 1983) (denying request for reconsideration of order to unseal documents); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 557 (E.D.N.Y. 1983) (ordering special master to review discovery decisions in light of court's decision to try causality and liability issues); *In re "Agent Orange" Prod. Liab. Litig.*, 98 F.R.D. 558 (E.D.N.Y. 1983) (approving special master's order of additional discovery to clarify circumstances surrounding document destruction); *In re "Agent Orange" Prod. Liab. Litig.*, 570 F.Supp. 693 (E.D.N.Y. 1983) (clarifying program for discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 571 F.Supp. 481 (E.D.N.Y. 1983) (granting motion of law firm to be relieved as lead counsel for plaintiffs and appointing new plaintiffs' management committee); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 338 (E.D.N.Y. 1983) (approving discovery recommendations of special master); *In re "Agent Orange" Prod. Liab. Litig.*, 99 F.R.D. 645 (E.D.N.Y. 1983) (lifting prior protective order applying to government documents obtained during discovery); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y.) (certifying Rule 23(b)(3) and Rule 23(b)(1)(B) classes), *appeal denied*, 100 F.R.D. 735 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 778 (E.D.N.Y. 1984) (denying motion to implead suppliers of chemical components); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 690 (E.D.N.Y. 1984) (finding national consensus law on issues of liability, government contractor defense and punitive damages); *In re "Agent Orange" Prod. Liab. Litig.*, 580 F.Supp. 1242 (E.D.N.Y.) (reinstating third-party plaintiffs' claim for indemnity against government with respect to claims of veterans' wives and children), *mandamus denied*, 733 F.2d 10 (2d Cir.), *appeal denied*, 745 F.2d 161 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97 (E.D.N.Y. 1984) (ordering *in camera* disclosure of names of scientists deleted from government report); *In re "Agent Orange" Prod. Liab. Litig.*, 597 F.Supp. 740 (E.D.N.Y. 1984) (approving

settlement of class action subject to fairness hearings); *In re "Agent Orange" Prod. Liab. Litig.*, 603 F.Supp. 239 (E.D.N.Y. 1985) (dismissing claims of veterans' wives and children against government), *aff'd in part, vacated in part*, 818 F.2d 201 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985) (modifying protective orders); *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577 (E.D.N.Y. 1985) (affirming with modification magistrate's order that defendants in two non-settled cases produce deponents); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1221 (E.D.N.Y. 1985) (dismissing defendants' claim for indemnity from government for settlement payments to veterans' families), *aff'd*, 818 F.2d 204 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1223 (E.D.N.Y. 1985) (ruling as to admissibility of opt-out plaintiffs' scientific evidence and expert testimony and granting summary judgment in favor of defendants for plaintiffs' failure to establish causation), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1267 (E.D.N.Y. 1985) (same), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1285 (E.D.N.Y. 1985) (dismissing action brought by Hawaiian civilians), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1290 (E.D.N.Y. 1985) (dismissing claim of civilian physician for failure to demonstrate exposure to herbicides), *aff'd in part, vacated in part*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1296 (E.D.N.Y. 1985) (determining class-action plaintiffs' attorney fees and reaffirming settlement); *aff'd in part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1396 (E.D.N.Y. 1985) (establishing plan for disbursement of settlement fund pending appeals), *aff'd in part, rev'd in part*, 818 F.2d 179 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F.Supp. 1452 (E.D.N.Y. 1985) (denying motion to set aside attorney fee-sharing arrangement),

rev'd in part, 818 F.2d 216 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 623 (E.D.N.Y. 1985) (approving settlement of class action and dismissing with prejudice claims of class members); *In re "Agent Orange" Prod. Liab. Litig.*, 618 F.Supp. 625 (E.D.N.Y 1985) (approving plan for Australia and New Zealand); *In re "Agent Orange" Prod. Liab. Litig.*, 787 F.2d 822 (2d Cir. 1986) (dismissing claims of non-class plaintiffs against defendant not named in complaints); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14 (2d Cir. 1986) (denying motion to disqualify plaintiffs' attorneys from appealing settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 804 F.2d 19 (2d Cir. 1986) (denying repeal of stay on settlement funds pending appeal); *In re "Agent Orange" Prod. Liab. Litig.*, 689 F.Supp. 1250 (E.D.N.Y. 1988) (modifying class assistance program as required by 818 F.2d 179 and granting opt-out plaintiffs opportunity to opt into class for purposes of benefiting from settlement fund).

Narratives of these events are in print. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 148-61 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Nevertheless, a brief recapitulation of certain aspects of this history is desirable as background to the current phase of the *Agent Orange* litigation saga.

While in the service of their country, hundreds of thousands of military service personnel were exposed to the defoliant Agent Orange, which contained trace elements of dioxin. Lawsuits on behalf of veterans proliferated throughout the country starting in 1978. The suits — as much a demand for compensation as a political protest of the treatment of Vietnam veterans by the government and public at large — were brought against the various manufacturers of defoliants, who in turn impleaded the federal government. Between two and three million members of the armed forces who served in or near Vietnam as well as their families were potential plaintiffs.

In 1979, the Judicial Panel on Multidistrict Litigation transferred as MDL 381 over 600 cases involving about 15,000 plaintiffs to the Eastern District of New York for coordinated and consolidated pretrial proceedings. In the initial proceedings of MDL-381, the court denied defendants' motion to dismiss for lack of subject matter jurisdiction because the complaint raised questions of federal common law. *See* 506 F.Supp. at 737. When the Second Circuit Court of Appeals reversed this ruling, *see In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), the litigation became a suit predicated on diversity jurisdiction.

In December of 1980, the court granted the federal government's motion to be dismissed as a third-party defendant on the basis of sovereign immunity. 506 F.Supp. at 762. It also denied plaintiffs' motion to create a "limited fund" class action under Federal Rule of Civil Procedure 23(b)(1)(B), and instead indicated that it planned to certify a "common question" class under Rule 23(b)(3). *Id.* In addition, the court denied the defendants' motion to dismiss on the ground that the production of defoliants was ordered by, and met the specifications of, the federal government (the "military contractor defense"). The court indicated the defendants could later attempt to prove the applicability of the defense. *Id.* Following discovery, the court granted, but did not enter, summary judgment on the military contractor defense for some but not all defendants. 565 F.Supp. at 1263.

In December of 1983, the court certified two classes of plaintiffs and scheduled a trial to commence in May of 1984. A Rule 23(b)(3) class with opt-out rights was created to try the fundamental common question of the causal relationship between dioxin and plaintiffs' injuries. 100 F.R.D. at 718. In addition, a Rule 23(b)(1)(B) limited fund class without opt-out rights was created to cover plaintiffs' punitive damage claims. *Id.* The 23(b)(3) class was defined as

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from

> 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729. Pursuant to Rule 23(c)(2), the court ordered plaintiffs' counsel to notify class members by mail where possible, and by radio, television, magazine, and newspaper announcements throughout this country, Australia, and New Zealand. The mailings and announcements informed class members that they would be bound by the class action unless they forwarded a written request for exclusion to the clerk of the court by May 1, 1984. *Id.* at 732. Fewer than 2,500 servicepersons filed opt-out requests. *See* 597 F.Supp. at 756.

B. *The Settlement Agreement*

On May 7, 1984, a tentative settlement was forged. According to its terms, the defendants agreed to pay the class $180 million in final settlement of all claims arising out of exposure to *Agent Orange* then or in the future. Concerned with the potential for new actions and recognizing the need for finality, the Settlement Agreement expressly stated that "[t]he class specifically includes persons who have not yet manifested injury." 597 F.Supp. at 865.

The Settlement Agreement provided that the $180 million be paid into a Settlement Fund to be established, maintained, and administered by the court. The agreement also required the court to retain jurisdiction over the Settlement Fund pending its final disposition. *Id.* at 866. The exclusive remedy provided for all class members was a claim against the Settlement Fund. Under the Settlement Agreement, class members were forever barred from instituting or maintaining any action against defendants arising out of or relating to, or in the future arising out of or relating to, exposure to Agent Orange. The Settlement set aside

$10 million of the $180 million to indemnify the defendants from any judgments obtained in state court actions by members of the class alleging harm caused by exposure to Agent Orange in or near Vietnam. Any part of the indemnity fund not used reverts to the benefit of the class members.

The Settlement Agreement was preliminarily approved on January 7, 1985. *See id.* at 862. Notice of the proposed settlement was given to the class. Following eleven days of fairness hearings in five cities, the court granted final approval of the Settlement Agreement on June 18, 1985. 611 F.Supp. at 1347. Subsequently, the court issued an Order and Final Judgment of Dismissal which: (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of the class action; and (3) retained the court's jurisdiction over the class action for the purpose of maintaining, administering, and distributing the Settlement Fund. *See* 618 F.Supp. at 624.

C. *Dismissal of Opt-Out Claims*

After the court preliminarily approved the Settlement Agreement, most of the original 2,500 opt-outs chose to opt back into the class. Two hundred and eighty-two servicepersons did not. *See* 611 F.Supp. at 1230. Their claims were embodied in seventeen different cases.

Summary judgment was granted against each opt-out plaintiff on the grounds, *inter alia*, that none could prove by the probability demanded in tort litigation that his or her ailment was caused by Agent Orange, *see* 611 F.Supp. at 1260-63; 611 F.Supp. at 1284-85, and that all the claims were barred by the military contractor defense. *See* 611 F.Supp. at 1263-64; 611 F.Supp. at 1285.

D. *Appeals*

Various district court rulings including the final judgment were appealed to the Court of Appeals for the Second Circuit.

The rulings included orders certifying the class action, approving the Settlement Agreement, outlining the distribution plan, awarding counsel fees, granting summary judgment against the opt-out claimants, dismissing untimely claims, and dismissing all claims of class members who objected to the Settlement Agreement. Specifically assigned as errors were the inclusion in the class definition of persons with latent or "after-manifesting" injuries, the sufficiency of the notices of class certification and settlement of the action, the adequacy of the Settlement Fund, and the propriety of the distribution plan.

In nine unanimous opinions dated April 21, 1987, the Court of Appeals disposed of all of the numerous individual appeals except those from the order of the district court providing for public access to documents sealed from public view during discovery. Petitions for rehearing were denied. The Court of Appeals approved the settlement and multiple petitions to the United States Supreme Court were denied.

Specifically, the Court of Appeals affirmed the adequacy of notice, the adequacy of the representation given the absent class members, the fairness of the settlement, and the dismissal of the opt-out plaintiffs' claims. *See* 818 F.2d 145 (affirming class certification, adequacy of notice to class, and approving settlement); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 179 (2d Cir. 1987) (approving Veteran Payment Program but rejecting Class Assistance Program as an organization operated independently of the court); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (2d Cir. 1987) (affirming summary judgment against opt-out plaintiffs), *cert. denied*, 487 U.S. 1234 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987) (affirming dismissal of Federal Tort Claims Act claims of servicepersons and their relatives); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201 (2d Cir. 1987) (affirming dismissal of "direct" claims against the United States brought by wives and children of servicepersons), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204 (affirming dismissal of manufacturers' claim for indemnity against United States for settlement payments); *In re*

"Agent Orange" Prod. Liab. Litig., 818 F.2d 210 (2d Cir. 1987) (affirming dismissals of Hawaiian civilians' actions), *cert. denied*, 484 U.S. 1004 (1988); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir.) (rejecting plaintiff class attorneys' fee-sharing agreement and reinstating in part fee award determination of district court), *cert. denied*, 484 U.S. 926 (1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226 (2d Cir. 1987) (affirming district court's calculations of attorney fees but reinstating certain fees against which district court had offset discovery costs).

II. OPERATION OF THE SETTLEMENT FUND

The court outlined its proposed plan for the use of the Settlement Fund in May of 1985. 611 F.Supp. at 1396. On July 5, 1988, the court announced the final plan for distribution. 689 F.Supp. at 1250. At that time, the fund had approximately $240 million in assets. Some $13 million was used for attorney fees. Five million dollars was set aside for the benefit of veterans from Australia and New Zealand. $170 million was allocated to the Agent Orange Veteran Payment Program designed to compensate disabled veterans and their survivors. The Payment Program compensates for the death or disability of any class member that occurs on or before December 31, 1994 or until the Plan's funds run out, whichever comes first.

Another $42 million was designated to the Agent Orange Class Assistance Program. It distributes funds in the form of grants to organizations that provide services to children with birth defects and their families and assistance to Vietnam veterans who are not otherwise able to obtain needed assistance. The $10 million indemnity fund will be added to the fund for the Class Assistance Program if it is not used for state litigation prior to 1994.

A. *Veteran Payment Program*

In light of the dismissal of the claims of the opt-out plaintiffs, the court ruled, as a matter of equity, that any person who

had opted out of the class action settlement was automatically eligible to participate in the Payment Program unless he or she "opted-out" a second time by January 1, 1989. *See* 689 F.Supp. at 1262. Initially, the court required a veteran or his or her survivor seeking compensation from the Payment Program to request an Application Kit within 120 days of learning of the death or injury or by January 1, 1989, whichever was later. The date was extended and then abolished altogether as a condition for sharing in the fund. All fully completed applications received prior to the termination of the Program will be considered timely. Berman, *The Agent Orange Veteran Payment Program*, 53 Law & Contemp. Probs. 49 (1990), provides an account of the basic operation of the Program.

As of September 30, 1991, the Payment Program has received applications from more than fifty thousand persons. Approximately 80% of these applications were filed by veterans seeking disability payments; the other 20% were filed by surviving family members. The following chart outlines the status of the applications:

Number approved and paid	26,727
Number denied	19,882
Number pending	1,967
Number inactive	5,191
Total	53,767

See Report of the Special Master on the Distribution of the Agent Orange Settlement Fund, Third Annual Report (October, 1991). As of September 30, 1991, a total of $86,255,351 had been disbursed to eligible applicants under the Payment Program.

About 80% of the claims submitted to the Payment Program are disability claims. Of these, 12,091 (roughly 28%) resulted from disabilities occurring after May 7, 1984 (the settlement date). 9,350 of those claims have been approved for payment. The remaining 20% of filed claims are for survivor payments. Of these, 6,350 (about 53%) are for deaths occurring after May 7,

1984. 4,242 of these claims have been approved. *See Third Annual Report, supra.*

Applicants who disagree with the disposition of their applications may file an appeal with the court-appointed Special Master for Appeals. As of September 19, 1991, 10,396 appeals had been filed and a total of 9,816 decisions had been rendered. Of the decisions on appeal, 6,890 affirmed the determination below and 2,926 overruled or modified the decision. For each case, the court's approval is required before the Special Master's determination becomes final.

In overseeing the Payment Program the court has received thousands of letters and telephone inquiries from veterans or their families. Many seek information about the processing of their claims; others request specific relief such as an advance payment because of hardship or necessity. The court responds to each inquiry by either contacting the disbursing agent for the Agent Orange Payment Program, the Special Master for Appeals, or, where appropriate, granting the requested relief. As mentioned above, the court has passed upon almost 10,000 appeals in individual cases. It receives frequent reports from the bodies administering the program and its financial advisors. All disbursements from investment funds are approved by the court. It is also in frequent contact with Special Master Kenneth Feinberg about such matters as the successful legislative and administrative decisions to exempt settlement funds from taxation and from liens of the Department of Veterans Affairs and others. The court has also consulted with the Advisory Board to the Payment Program, which is composed of veterans Albert S. Dandridge, III, Esq., Donna-Marie Boulay, Esq., Charles T. Hagel, Vincent Martin, and John McElrath.

B. *Class Assistance Program*

The Class Assistance Program provides services to large numbers of possibly exposed veterans and their families with special emphasis given to children with birth defects. The Program is administered by the court with the advice of

Executive Director Dennis K. Rhoades, Deputy Director Michael Leveck, and a board of unpaid Vietnam veteran advisors currently consisting of Rev. Robert Certain, Steven Champlin, Ronald Gardner, Charles T. Hagel, Mary Lou Keener, Gary E. May, Frank McCarthy, Hon. Matthew Railey, Dr. Oscar Salvatierra, and Solomon B. Watson, IV.

Continuing supervisory responsibility requires the court to review each of the proposed grants. The court also attends regular meetings with the Executive Director and advisory board. The Executive Director reports to, and requests advice and authority from, the court in specific matters in frequent phone and face-to-face consultations. The court also has physically inspected the operation of a number of the institutions funded by the program and meets with the leaders of many more of these organizations.

Since its inception, the Class Assistance Program has awarded 134 grants worth a total of almost $24 million. Of these grants, 71 are active, providing $13.5 million in services to veterans and their families in 46 states. *Third Annual Report of the Agent Orange Class Assistance Program* (October 3, 1991). Recipients include local and national Vietnam veterans' groups, agencies serving adults and children with disabilities, and agencies providing family counseling. *See* Appendix 1. The various programs in these areas provide services ranging from counseling and other direct assistance to help in obtaining services and benefits from government and private providers for which veterans and their families are eligible. *See* Appendix 2. All organizations that receive funds file quarterly reports and undergo annual evaluations both to assist them in achieving their goals and to ensure that grant money is being used effectively. The Class Assistance Program estimates that, in the last three years, grantee-organizations have served about 46,000 veterans and family members. *See* Appendix 3.

In the summer of 1991, students from Touro Law School, volunteers, and Program staff examined some 250,000 claims files of the court and obtained the names of about 75,000

birth-disabled children of Vietnam veterans who may have been exposed to Agent Orange. Their families will be contacted in an attempt to assist them with the network of social and medical agencies cooperating with the Class Assistance Program.

The staff of the Class Assistance Program, working with state bodies, veterans' groups, academic institutions, and national and local social service institutions, also conducts training programs. A major thrust of these programs is to educate agencies and workers in the helping professions on the needs of veterans as family members.

III. THE PRESENT ACTIONS

The two actions in which motions to remand are pending are, in effect, a direct challenge to the validity of the settlement and the programs now financed by the Settlement Fund. Those plaintiffs who are class members have now sued the same chemical companies who were defendants in the original *Agent Orange* litigation on the same grounds and for the same relief as was originally sought and compromised in the class action. If plaintiffs are successful, they will automatically reduce the sums available for other class members, since the terms of the settlement set aside $10 million for indemnification of the defendants against suits of this kind.

In starkest terms, the cases present the question of whether members of a class whose action was brought and is still pending in federal court can circumvent the effect of a federal judgment by bringing new actions in a state court relying exclusively on state law. The need to protect other class members, the importance of maintaining the class action as viable litigation device, and the interest of all litigants in the finality of settlements require that the question be answered in the negative.

A. *Hartman I*

In June 1988, *Hartman v. Diamond Shamrock Chemical Co.* (*Hartman I*) was commenced in Texas state court. The plaintiffs were Ronald Hartman and his wife and children. Mr. Hartman

is a Vietnam veteran who was diagnosed in 1988 as having non-Hodgkins lymphoma. His children, Jeffrey Alan Hartman and Angela Marie Hartman, both suffer from birth defects. Katherina Hartman, his wife, claims emotional injury arising out of her husband's and childrens' conditions.

The Hartman complaint was the same in all substantive respects as the class action complaint in *Agent Orange*. Plaintiffs sought compensatory and punitive damages on behalf of a class of veterans exposed to Agent Orange in Vietnam who allegedly manifested injuries after the May 7, 1984 settlement date or who discovered their injuries after that date. The defendants were the same chemical companies sued in the *Agent Orange* class action. The *Hartman I* action was filed by Benton Musslewhite, Esq., an attorney who participated in the representation of the *Agent Orange* class and signed the Settlement Agreement.

Hartman I was removed to the United States District Court for the Eastern District of Texas. The case was transferred to this court by the MDL panel on February 1, 1989. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL-381 (J.P.M.D.L. Feb. 1, 1989) (unpublished order). At plaintiffs' request, this court dismissed the *Hartman I* action without prejudice on September 25, 1989.

B. *Ivy and Hartman II*

In May 1989, a group of 34 plaintiffs commenced *Ivy v. Diamond Shamrock Chemicals Co.* in Texas state court. Like the *Hartman I* plaintiffs, most of the plaintiffs in *Ivy* assert that they suffered injuries as a result of exposure to Agent Orange during service in the Armed Forces in Vietnam and that their injuries did not manifest themselves or were not discovered until after May 7, 1984. Charles Jardon, Gary Thomas, James Kent, Earl Thompson, James Donald Deloatch, and Emile Annibolli claim injury from exposure to Agent Orange during military service in Vietnam from 1963 to 1971. Family members include Shirley Ivy, Verda Wilson, Shirley Zalewaski, Dawn Marie Inman, Peggy Sands, Ursula Margot Parry, and Laura Jenkins, who

bring actions on behalf of themselves and the estates of deceased veterans Donald Ivy, Isaiah Wilson, Jr., Yen Zalewaski, Bobby Joe Inman, Martin Sands, James D. Parry, Sr., and Eddie Jenkins. Toni K. Jardon, Charles Jardon, Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Mary Lee Thomas, Emma Kent, Judy L. Thompson, and Joyce Deloatch also sue as family members. All of these plaintiffs fall within the class as defined in the original *Agent Orange* litigation.

Two of the claimants in the *Ivy* action allege injuries from exposure to Agent Orange while acting in a civilian capacity. Charles Brown and Clarence White (whose estate is being represented by James White) served as civilian employees in Vietnam and claim to have been injured from exposure to *Agent Orange*. Since these civilian plaintiffs did not serve in a military capacity, they are not members of the class bound by the 1984 settlement and order.

There is some confusion as to representation of some of the *Ivy* plaintiffs. Robert Hager, Esq. only claims to represent Donald Ivy, Shirley Ivy, James Deloatch, and Joyce Deloatch. The other plaintiffs in the *Ivy* action are represented by counsel in Texas who did not appear in this court.

Shirley Ivy is attempting to be a class representative of a class of veterans and survivors who manifested or discovered injury after the May 7, 1984 opt-out deadline. Ronald Hartman is attempting to do the same in *Hartman II*.

James Deloatch, Joyce Deloatch, Tamara Deloatch, James L. Kent, Sr., Emma Kent, Charles E. Brown, Gary F. Thomas, and Mary Lou Thomas purported to opt out of the *Agent Orange* class by filing notices with the Clerk of the Court in August of 1988. Shirley Ivy also filed an opt-out notice on behalf of herself and her deceased husband, Donald Ivy, with the Clerk of the Court on August 25, 1991.

Some *Ivy* plaintiffs have availed themselves of the Veteran Payment Program. Shirley Zalewaski apparently filed a notice purporting to opt out of the class but later requested an

application for the Payment Program. In March 1989, Verda Wilson applied for a survivor payment from the Agent Orange Veteran Payment Program on behalf of her late husband, Isaiah Wilson, Jr. In September she was denied relief but that decision was overruled by the Special Master for Appeals. On January 15, 1991, the court approved payment to her of a survivor award. She received $3,400 in March of this year. In May 1990 Laura Jenkins also applied for survivor payments on behalf of her late husband, Eddie Jenkins. She was approved for payment and received $2,040 in February, 1991. Plaintiffs Ursula Margot Parry and Shirley Zalewaski have applied for payment from the Settlement Fund and have been sent application kits which they have not yet returned.

The *Ivy* complaint, which seeks compensatory and punitive damages for "after-manifested" injuries, expressly disclaims reliance on federal law. Defendants nevertheless removed the *Ivy* action to federal court on federal question grounds.

In April 1990, a second action was filed by the *Hartman I* plaintiffs in Texas state court. With one exception, the complaint in *Hartman II* is essentially identical to *Hartman I*; like the complaint in *Ivy*, it disavows reliance on any right or recovery under federal law. *Hartman II* was also removed to federal court. While the *Ivy* and *Hartman II* actions have not been consolidated, the plaintiffs in both actions will be referred to collectively as "plaintiffs."

In both the *Ivy* and *Hartman II* notices of removal, the defendants offered two grounds for federal subject matter jurisdiction. First, the court was said to have jurisdiction over this action "because most of the plaintiffs' claims have already been asserted and adjudicated in federal court and plaintiffs' petition is merely an artful pleading to avoid federal jurisdiction." Second, the court's jurisdiction was invoked "pursuant to 28 U.S.C. § 1331 based on the doctrine of complete federal preemption."

On January 31, 1990, the plaintiffs petitioned the United States Court of Appeals for the Second Circuit for a writ of

mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The petition was denied on March 28, 1990. *See In re Ivy*, 901 F.2d 7 (2d Cir. 1990). The Court of Appeals directed that the issue of subject matter jurisdiction be considered in the first instance by the transferee court. *Id.*

In October 1990, plaintiffs moved in this court for an order remanding both actions to the Texas state courts on the ground that federal subject matter jurisdiction was lacking. In December 1990, defendants moved under the All-Writs Act, 28 U.S.C. § 1651, for an injunction prohibiting the plaintiffs, their attorneys and certain nonparties from prosecuting *Ivy* and *Hartman II* and from commencing any new actions compromised by the Settlement Agreement.

A second mandamus petition that sought to prevent this court from ruling on the merits of the case was denied without opinion in December 1990. *In re Ivy*, No. 90-3065 (2d Cir. Dec. 12, 1990). A third mandamus petition seeking relief similar to the second petition was denied in March of 1991. *In re Ivy*, No. 91-3011 (2d Cir. Mar. 5, 1991).

Oral argument on the motion to remand was heard on March 6, 1991. Given the complexity of the legal issues and the questions posed by the court, time for further briefing was requested by the defendants. The motion to remand and any additional dispositive motions were rescheduled to be heard on May 6, 1991.

Prior to the May 6 return date, defendants moved to dismiss plaintiffs' claims. Defendants further moved for leave to amend their notice of removal to add 28 U.S.C. § 1442(a)(1) (removal of cases involving federal officer or persons acting under such officer) as a basis for jurisdiction. Plaintiff Hartman moved for an order consolidating the *Ivy* and *Hartman II* actions for trial purposes.

On May 6, 1991 the court heard oral argument on the following motions:

1. Plaintiffs' motion to remand to the Texas state courts.

2. Defendants' motion under the All-Writs Act for an injunction prohibiting further state court litigation.

3. Defendants' motion to dismiss.

4. Defendants' motion for leave to amend the notice of removal to add an additional basis for jurisdiction.

At the hearing, the parties requested additional time for supplemental briefing. The court gave the plaintiffs until July 6, 1991 and the defendants thirty days from that date. No further argument was scheduled. Plaintiffs requested and received a two month adjournment to September 6. A further application for another 30 day extension was made by the plaintiff on August 28, 1991; it was denied in view of the desirability of a final decision.

Defendants most recently requested still more time to respond to plaintiffs' extensive scientific submissions. The court granted thirty days to both parties to supplement their scientific documentation. While the court believes the scientific contentions on both sides are irrelevant, and, if relevant, not dispositive, the parties desire to make a record for purposes of appeal. The court saw no reason to deny them that opportunity.

IV. LAW

A. *Subject Matter Jurisdiction*

The sole basis advanced to justify remand is the alleged lack of federal subject matter jurisdiction. Since diversity jurisdiction is lacking and the complaints disavow reliance on federal law, plaintiffs maintain that the cases belong in state court. With respect to all the plaintiffs who fall within the definition of the class in the *Agent Orange* litigation, this position is without merit. This court retained jurisdiction over the class action and has authority to ensure that its prior orders and the Settlement Agreement are enforced. If an independent basis for jurisdiction

were necessary, the complaint itself calls into question federal law by undermining a final federal class action judgment.

The two civilian plaintiffs in *Ivy* are, however, in a separate category. They are not members of the class and are therefore not bound by the Settlement Agreement. Their cases are severed from the claims of the remaining plaintiffs. The question of the court's jurisdiction over these plaintiffs will be addressed in a separate memorandum. For the remainder of this opinion, the term "plaintiffs" refers only to the veteran plaintiffs.

1. Adequacy of Notice of Removal

Defendants' removal was proper because the court retains jurisdiction over the Settlement Agreement and because it must enforce its bar on subsequent suits by class members against the defendants. In addition, plaintiffs' state law complaint is an artfully pleaded attempt to avoid a prior binding federal judgment. Defendants' removal notices in the *Ivy* and *Hartman II* expressly identify only the last of these grounds. Although the notice is somewhat less clear than it might have been as to the other bases of subject matter jurisdiction, this court is charged with the duty, consistent with the general rules of notice pleading, to construe removal notices, like all pleadings, liberally and in accord with substantial justice. *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966); *Harlem River Produce Co. v. Aetna Cas. & Sur. Co.*, 257 F.Supp. 160, 163-64 (S.D.N.Y. 1965); *cf. Curley v. Brignoli, Curley & Roberts Ass'ns*, 915 F.2d 81, 85 (2d Cir. 1990) (court will look beyond face of complaint to establish diversity jurisdiction), *cert. denied*, 111 S.Ct. 1430 (1991). Jurisdiction on grounds not explicitly stated in the notice of removal is appropriate where the grounds are implicit in the situation. *See Walker v. Gibson*, 604 F.Supp. 916, 919 (N.D. Ill. 1985); *Harper v. National Flood Insurs. Ass'n*, 494 F.Supp. 234, 236 (M.D. Pa. 1980).

Defendants' notice properly stated one adequate ground for removal: plaintiffs' artful pleading to avoid a final federal judgment. Defendants' claims that plaintiffs' actions are

removable under the doctrine of federal preemption and have already been asserted in federal court in a pending federal action, taken in context, support the additional grounds discussed below.

2. Court's Retained Jurisdiction

Plaintiffs are members of the *Agent Orange* class. The veterans all served in Vietnam between 1961 and 1972 and claim injuries from exposure to the herbicide. Family member claimants also fall within the plain terms of the class. For all of these plaintiffs, the Settlement Agreement compromised their claims. By bringing new actions in state court, the plaintiffs seek to avoid the effect of the Settlement Agreement and the judgment issued by this court.

A federal court retains the power to enforce and to consider challenges to settlements entered into in cases originally filed with the court. *See Fox v. Consolidated Rail Corp.*, 739 F.2d 929, 932 (3d Cir. 1984), *cert. denied*, 469 U.S. 1190, 83 L.Ed.2d 966, 53 U.S.L.W. 3528 (1985); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied*, 425 U.S. 912, 47 L.Ed.2d 762, 96 S.Ct. 1508 (1976). If there is no independent basis for jurisdiction, absent some special need of the parties, the settlement must have been "incorporated into an order of the court," *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299, 1303 (4th Cir.), *cert. denied*, 439 U.S. 1047, 58 L.Ed.2d 706, 99 S.Ct. 722 (1978), or there must have been a "deliberate retention of jurisdiction, as by issuing an injunction or by stating that jurisdiction is retained for a particular purpose." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985); *see United Steel Workers v. Libby, McNeil & Libby*, 895 F.2d 421, 423 (7th Cir. 1990); *cf. Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1371, 190 U.S.P.Q. (BNA) 392 (6th Cir.) ("Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic."), *cert. denied*, 429 U.S. 862, 50 L.Ed.2d 140, 97 S.Ct. 165, 191 U.S.P.Q. (BNA) 751 (1976).

By any standard this court has jurisdiction over both removed actions: a state suit will reduce the funds available to the class, providing a special need for exercise of federal jurisdiction; the settlement now sought to be circumvented by plaintiffs was embodied in a judgment of this court after full fairness hearings; and, since the class action is still pending in this court, jurisdiction was deliberately retained and is being exercised.

The practical effect of the new actions will be harmful to other class members. Any judgments in state court against the defendants will be paid from the indemnity fund. When parties to a federal action are being adversely affected, the court may not allow its judgment and orders to be flouted. *See Meetings & Expositions, Inc. v. Tandy Corp.*, 490 F.2d 714, 717 (2d Cir. 1974) (court has duty to enforce settlement it approved). This is especially true in class actions. "In a class action, the district court has a duty to see that any settlement it approves is completed, and not merely to approve a promise . . . ." *In re Corrugated Container Antitrust Litig.*, 752 F.2d 137, 141 (5th Cir.), *cert. denied*, 473 U.S. 911 (1985).

The Settlement Agreement was incorporated by the court in the decision upholding its fairness, subject to hearings on attorney fees and consideration of plans for distribution. 597 F.Supp. at 862. The Settlement Agreement was also approved "according to its terms" in the court's order and final judgment. 618 F.Supp. at 624-25. In its final order and judgment of dismissal, the court explicitly retained jurisdiction "for the limited purposes of maintaining, administering and distributing the Settlement Fund, pending its final disposition." 618 F.Supp. at 625. That continuing mandate was broadened when the Court of Appeals for the Second Circuit also directed the court to maintain jurisdiction over the Class Assistance Program and to supervise and manage the distribution of the entire Settlement Fund. 818 F.2d at 185-86.

The intimate involvement of the court with the administration of both the Payment Program and the Class

Assistance Program evidences the court's continuing jurisdiction over the class. On a daily basis, the court responds to inquiries of class members. When necessary, it assists them in obtaining compensation from the Settlement Fund. It continues to review the thousands of decisions of the Special Master of Appeals. Each grant developed by the Class Assistance Program is examined and must be approved by the court. Current scientific literature and legislative action are reviewed and made part of the court file. The number of entries on the case docket has grown from approximately 8,000 at the time of settlement to over 13,000 today. These activities are more than sufficient to support a finding that the court retained jurisdiction.

Since the court has retained jurisdiction over the class action it has authority to ensure that the Settlement Agreement it previously approved is enforced according to its terms. Under the circumstances, a new and independent basis for subject matter jurisdiction is not necessary for the court to rule on the merits of plaintiffs' claims. The claims are a challenge to the integrity of the Settlement Agreement and the authority of this court. This court has the power and the obligation to protect and effectuate its orders and final judgments in the *Agent Orange* litigation.

3. Court's Power to Enforce Its Injunction

As part of the Order and Final Judgment of Dismissal, the court enjoined all class members from commencing any action arising out of or related to exposure to Agent Orange. 618 F.Supp. at 624. The plaintiffs are all members of the class barred from instituting new actions against the settling defendants.

A federal court, as a court of equity, has the authority to enforce its injunction "with or without an explicit reservation of jurisdiction . . . ." *McCall-Bey v. Franzen*, 777 F.2d 1178, 1183 (7th Cir. 1985). "The mandate of an injunction issued by a federal district court runs nationwide, and 'violation of an injunctive order is cognizable in the court which issued the injunction regardless of where the violation occurred.'" *Waffenschmidt v. Mackay*, 763 F.2d 711, 716 (5th Cir. 1985),

cert. denied, 474 U.S. 1056 (1986) (citation omitted) (quoting *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963)).

The fact that the judgment is not labeled an injunction is irrelevant. "The determination of whether an order is an injunction depends upon the substantial effect of the order rather than its terminology." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1980), *cert. denied*, 459 U.S. 988 (1982). By barring "each and every plaintiff and member of the . . . class . . . from instituting or maintaining any action against any of the defendants," 618 F.Supp. at 624, the court effectively issued an injunction which bars the current actions.

The plaintiffs are all subject to the court's bar against instituting new actions against these defendants. Plaintiffs have violated the court's order by bringing a new action in another forum.

4. Federal Nature of Plaintiffs' Claims

The plaintiff is normally the master of its complaint, and a federal question will not be found if it is not in the complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 53 L.Ed. 126, 29 S.Ct. 42 (1908). Nevertheless, this court must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Travelers Indem. Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722, at 268-75), *cert. denied*, 479 U.S. 272, 93 L.Ed.2d 613, 55 U.S.L.W. 4077, 107 S.Ct. 683 (1986). An action relying on state law is essentially federal in nature where a plaintiff has had its rights determined by a federal court and the subsequent state action is an attempt to avoid the prior federal judgment. *See Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 397, 69 L.Ed.2d 103, 101 S.Ct. 2424 & n.2 (1981).

In *Moitie* plaintiffs brought a federal antitrust action and the claim was dismissed on the merits. Plaintiffs then used the same facts to assert a state law claim against the same defendants. The action was removed to federal court and dismissed on *res*

judicata grounds. While there was no federal claim apparent on the face of the complaint, the Supreme Court endorsed the lower courts' finding that the claim was considered "federal in nature" because it was merely an "artful pleading" to avoid the prior federal judgment. *Id.*

The Second Circuit Court of Appeals in clarifying *Moitie* has identified two criteria for determining when a state action will be considered federal in nature. First, the elements of the claim must be "virtually identical" to those in the prior federal action. *Sarkisian*, 794 F.2d at 760. Second, the plaintiff must have chosen the federal forum in the earlier litigation. *Id.* The second element is critical in rendering the state claim "federal" since it implies that "plaintiff's choice of a state forum is motivated by the desire to evade the consequences of prior federal litigation." *Bowlus v. Alexander & Alexander Servs. Inc.*, 659 F.Supp. 914, 918-19 (S.D.N.Y. 1987); *see Sarkisian*, 794 F.2d at 760.

Both of the *Sarkisian* criteria are present here. Plaintiffs are members of the *Agent Orange* class action. Although plaintiffs affirmatively disclaim reliance on federal law and assert state law as the sole basis for relief, these claims are identical to the claims raised by the class action complaint. The class plaintiffs chose the federal forum to manage the class action. These new plaintiffs cannot now "abuse the dual court system by filing in state court a second lawsuit . . . ." *Sarkisian*, 794 F.2d at 761.

Plaintiffs object to the application of *Sarkisian* for two reasons. First, they argue that the rule of that case controls only if the first federal court litigation is brought under federal question rather than diversity jurisdiction. Since the *Agent Orange* litigation was a diversity action, plaintiffs contend that it does not fall within the *Sarkisian* rule. While it is true that *Sarkisian* itself involved a prior federal question claim, there is no indication that the Court of Appeals intended to so limit its reach. Such a limit would be unjustifiable in light of the policy behind the *Sarkisian* doctrine of preventing "double-dipping." Surely it is a worse abuse to litigate *exactly* the same state law

claims twice than it is to litigate parallel, though perhaps not identical, federal and state law claims.

Second, the plaintiffs contend that they never "chose" to proceed in the earlier litigation in this court and therefore cannot be said to be seeking avoidance of the Settlement. Since plaintiffs allege that they did not gain definitive knowledge of their membership in the *Agent Orange* class until their injuries manifested after the 1984 opt-out deadline, they argue that, as individuals, they did not actively choose to proceed. But the concept of the class action is that it is a representative litigation. If plaintiffs did not choose to litigate, their class representatives chose on their behalf.

In short, the plaintiffs' current actions challenge the viability of Rule 23 of the Federal Rules of Civil Procedure and of class action settlements. If the plaintiffs, as class members, are allowed to undermine a settlement agreement and set aside a federal court's judgment through new state court suits, it is hard to imagine any future defendant in a federal court class action considering settlement since the agreement would always be open to attack by class members in state court.

Because plaintiffs' actions are in reality artful pleadings to avoid a prior federal court decision, this court has jurisdiction over plaintiffs' removed actions.

5. Court's Power to Order Removal

The All-Writs Act, 28 U.S.C. § 1651(a), authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985); *see In re Joint Eastern & Southern Dists. Asbestos Litig.*, 120 Bankr. 648, 656 (E. & S.D.N.Y. 1990); *In re Joint Eastern & Southern Dist. Asbestos Litig.*, 134 F.R.D. 32, 37 (E & S.D.N.Y. 1990). The Act authorizes federal courts to exercise jurisdiction over persons "'who . . . are in a position to frustrate the implementation of a court order or the proper administration of justice.'" *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir.

1988) (emphasis omitted) (quoting *Benjamin v. Malcolm*, 803 F.2d 46, 53 (2d Cir. 1986)), *cert. denied*, 489 U.S. 1077 (1989). The Act even permits a federal court to remove state court actions to federal court in situations where specific statutory removal authority is absent. *City of Yonkers*, 858 F.2d at 863; *see United States v. New York Tel.*, 434 U.S. 159, 172, 54 L.Ed.2d 376, 98 S.Ct. 364 (1977).

By bringing new suits in state court, the plaintiffs challenge the binding effect of the Settlement Agreement and the order of this court prohibiting new suits by class members. The new suits are a direct threat to the continuing viability of the judgment settling the class action. The suits will also consume the $10 million set aside to indemnify the settling defendants and reduce the recovery of the remaining class members.

If the cases had remained in state court, the court would have had the authority to order their removal. Moreover, any rulings inconsistent with the prior federal order would have been subject to further injunction by this court. *See City of Yonkers*, 858 F.2d at 864 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974)). Taking jurisdiction of the cases after their voluntary removal is a "less drastic, and therefore preferable result." *City of Yonkers*, 858 F.2d at 864.

The removal of these actions to this court is a mechanism for protecting this court's judgment and order. Under the circumstances, it is the preferred method of enforcement, since it affords greater comity to state courts and is less burdensome on the parties than an injunction or contempt citation would be.

B. *Motion to Dismiss*

The terms of the Settlement Agreement, incorporated in this court's order, bar plaintiffs from proceeding with this action. That these plaintiffs' injuries were not discovered until after the initial opt-out deadline of May 1, 1984 is irrelevant. The Settlement Agreement expressly included "persons who have not yet manifested injury." 597 F.Supp. at 865. The agreement was approved by this court, upheld by the Second Circuit, and left

undisturbed by the Supreme Court. 618 F.Supp. at 624-25, *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Defendants' motion to dismiss is therefore granted with respect to all plaintiffs (other than the civilian plaintiffs).

Since the court has found that it has subject matter jurisdiction and has granted defendants' motion to dismiss, it need not decide defendants' motion to amend the notices of removal with regard to the plaintiffs who are class members. There has been, and continues to be, a court-ordered bar on suits by class members against the defendants; accordingly, the court also need not address defendants' motion for a permanent injunction.

V. EQUITY

At the heart of these lawsuits is plaintiffs' belief that it is unfair to bind them to the settlement because the latency of their injuries prevented them from knowing definitively whether or not they were included in the class at the time of the first deadline for opting out of the *Agent Orange* class action. The law allows them to be so bound. *See Kane v. Johns-Manville Corp.*, 843 F.2d 636, 638-639 (2d Cir. 1988) (affirming reorganization plan that binds future claimants with no present injuries). They are in fact bound. 618 F.Supp. at 625, *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004. Nevertheless, plaintiffs' argument raises significant considerations of justice.

The courts and Congress have long recognized the utility of equity actions in which one party brings suit as the representative of a group of claimants. *See* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1751, at 7 (2d ed. 1986). Such representative suits provide for, among other advantages, the filing of enforceable claims that would be economically infeasible for one party to pursue, the protection of all parties from inconsistent judgments, and the efficient administration of justice. *Id.* § 1754, at 54. Class actions are particularly valuable in mass torts where the transactional costs and burdens of individual litigation are great. *See In re Joint*

Eastern & Southern Dist. Asbestos Litig., 129 Bankr. 710, 803-39 (E. & S.D.N.Y. 1991); Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U.Ill.L.Rev. 269.

Nevertheless, a representative suit can work unfairness, particularly when the representation binds persons who only become aware that they are class members after settlement rather than persons who, at the time the action is brought and decided, can definitively determine whether they are in the class. One can imagine many genuine conflicts of interest between two such groups within a class action. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 Bankr. at 771-73. 1991. For example, current litigants might be willing to achieve a settlement even if it leaves funds inadequate to compensate future victims. Alternatively, future claimants might, in retrospect, disagree with prior litigation strategy or find new evidence in support of their claims.

Although Federal Rule of Civil Procedure 23(a) and (b) sets out criteria designed to ensure that all class members are being properly represented, for Rule 23(b)(3) actions, the "best practicable notice" requirement of Rule 23(c) is intended to provide additional protection of "the interests of individuals in pursuing their own litigations." *See* Fed. R. Civ. P. 23(c)(2) *Advisory Committee's Note to 1966 Amendments*. Yet a plaintiff with a latent injury may even have actual notice and still not receive this additional protection because he or she may not have reason to believe the injury will appear.

Courts are authorized to take steps to alleviate these problems in the interest of fairness. As in the Manville bankruptcy actions, courts can oversee the appointment of a guardian to represent the interests of future claimants in class action litigations and settlements. *See In re Joint Eastern & Southern Dist. Asbestos Litig.*, 129 Bankr. at 773. Such a guardian was not necessary in the *Agent Orange* Settlement because of the way it was structured to cover future claimants. All of the courts which considered the *Agent Orange* Settlement were fully cognizant of the conflict arguments now hypothesized

by the plaintiffs and took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund.

In many cases the conflict between the interests of present and future claimants is more imagined than real. In the instant case, for example, the injustice wrought upon the plaintiffs is nonexistent. These plaintiffs, like all class members who suffer death or disability before the end of 1994, are eligible for compensation from the Agent Orange Payment fund. The relevant latency periods and the age of the veterans ensure that almost all valid claims will be revealed before that time.

Even when it is proper and necessary for the courts to be solicitous of the interests of future claimants, the courts cannot ignore the interests of presently injured plaintiffs as well as defendants in achieving a settlement. Class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability. Making settlement of Rule 23 suits too difficult will work harms upon plaintiffs, defendants, the courts, and the general public.

No less than in 1978, when the first of the *Agent Orange* suits was brought, the predicament of the Vietnam veterans and their families is one that warrants national concern and action. The settlement of the *Agent Orange* litigation promised, and has provided, a partial remedy for many veterans' hardships. But the suffering of the veterans and their families, and the frustration and anger it causes, continues to argue for a more systematic and powerful cure. In 1984 this court urged that "the government join with plaintiffs and defendants in even greater efforts toward this noble goal." 597 F.Supp. at 862. Last year, an important step was taken by the Department of Veterans Affairs, which expanded care provided to Vietnam veterans by establishing an official "presumption" that, in certain circumstances, syndromes such as non-Hodgkin's lymphoma and chloracne resulted from service in Vietnam. 38 C.F.R. § 3.311a (1990). Congress has since codified and expanded this decision in a statute that also establishes a program for federally funded research into the connection between herbicide exposure and various diseases, to

be conducted in conjunction with the National Academy of Sciences. *See Agent Orange Act of 1991*, Pub. L. No. 102-4, 105 Stat. 11 (1991). Present and future claimants alleging exposure to Agent Orange thus may be eligible to receive compensation from both the *Agent Orange* settlement and the Department of Veteran Affairs.

By their actions, Congress and the Department of Veteran Affairs have recognized that the Agent Orange controversy has become a political rather than a judicial question. *See* 137 Cong. Rec. H719 *et. seq.* (January 29, 1991) (statements of members of Congress in support of the Agent Orange Act). Except for overseeing the expenditure of the Settlement Fund to ensure that it does the greatest possible good for the veterans and their families, the court can do nothing more for the plaintiffs.

VI. CONCLUSION

Decision on the plaintiffs' motion for remand as it affects the two civilian plaintiffs, Charles Brown and Clarence White, is reserved for further consideration. The motion for remand is denied as to all other plaintiffs. They are members of the class previously certified in the *Agent Orange* litigation. The claims of (or on behalf of) Shirley Ivy, Donald Ivy, Charles Jardon, Toni K. Jardon, Charles Jardon Jr., Robin Jardon, Warren Jardon, Sharon Jardon, Verda Wilson, Isaiah Wilson, Jr., Shirley Zalewaski, Yen Zalewaski, Gary Thomas, Mary Lee Thomas, James L. Kent, Emma I. Kent, Dawn Marie Inman, Bobby Joe Inman, Earl Thompson, Judy L. Thompson, James Donald Deloatch, Joyce Deloatch, Peggy Sands, Martin Sands, Emile Annibolli, Ursula Margot Parry, James D. Parry, Sr., James D. Parry, Jr., James Christopher Parry, Laura Jenkins, Eddie Jenkins, Ronald L. Hartman, Katherina H. Hartman, Jeffrey Alan Hartman, and Angela Hartman are dismissed.

No costs or disbursements are awarded. The court will not entertain a Rule 11 motion for sanctions. It has considered the issue and finds sanctions not warranted.

So ordered.

[APPENDICES TO OPINION OMITTED]

APPENDIX C

UNITED STATES DISTRICT COURT

For the Eastern District of New York

Nos. 79 Civ. 747, 89 Civ. 3361,
90 Civ. 3928, and MDL No. 381

MICHAEL F. RYAN, *et al.*,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, T H AGRICULTURE & NUTRITION COMPANY, INC., DIAMOND SHAMROCK CHEMICALS COMPANY, UNIROYAL INC., and THOMPSON CHEMICALS CORPORATION,

Defendants.

In re "AGENT ORANGE" Product Liability Litigation;

SHIRLEY IVY, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

RONALD L. HARTMAN, *et al.*,

Plaintiffs,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Defendants.

NOVEMBER 12, 1991

JUDGE: Jack B. Weinstein, United States District Judge

OPINION BY: WEINSTEIN

In the companion cases of *Ivy v. Diamond Shamrock Chemicals Co.*, 89 Civ. 3361, and *Hartman v. Diamond Shamrock Chemicals Co.*, 90 Civ. 3928, the claims of plaintiffs who fell within the class whose action was settled in 1984 were dismissed. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL No. 381, F.Supp. (E.D.N.Y. October 4, 1991).

On October 24, 1991 the court granted a hearing on a motion brought by counsel for the *Ivy* plaintiffs requesting (1) that, under Federal Rule of Civil Procedure 59, the court reconsider its October 4, 1991 memorandum, and (2) that the court disqualify itself from further proceedings under 28 U.S.C. § 455(a) for lack of impartiality.

Plaintiffs' Rule 59 Motion

Plaintiffs' Rule 59 motion is granted only insofar as it corrects factual mistakes concerning the procedural history of the Ivy and Hartman actions which appeared in the court's memorandum and order of October 4. That memorandum will be amended accordingly.

The issues of law raised by plaintiffs' Rule 59 motion are fully dealt within the October memorandum and need not be re-addressed here.

Plaintiffs' Section 455(a) Motion

Plaintiffs' motion under 28 U.S.C. § 455(a) is denied. The crux of that complaint is that the court is biased in favor of protecting the fund created by the 1984 class action settlement. The use of the word bias in this sense is inappropriate. A court has a duty to enforce settlements that were properly approved. *See In re "Agent Orange" Prod. Liab. Litig.*, MDL No. 381, F.Supp. (E.D.N.Y. October 4, 1991).

A judge is not disqualified from hearing a case because he or she has had previous dealings with the litigation. Judges are

competent to rule on collateral attacks against their own decisions. *See, e.g., Savitz v. G. D.Searle & Co.*, 94 F.R.D. 669, 669 n.1 (E.D.N.Y. 1982). Disqualification is only appropriate "by virtue of some factor which creates partiality arising outside of the events which occur in the [litigation] itself." *In re International Business Machines Corp.*, 618 F.2d 923, 927 (2d Cir. 1980). Plaintiffs do not allege such a factor.

Plaintiffs' Rule 59 motion is granted only to the extent described above; in all other respects it is denied. Plaintiffs' motion under 28 U.S.C. § 455(a) is also denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 92-7575

SHIRLEY IVY, et al.,

Plaintiffs-Appellants,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court For the Eastern District of New York

AUGUST 26, 1993

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Shirley Ivy, et al.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX F

AFFIDAVITS OF SHIRLEY IVY
(Pages 110-11 of Second Circuit Joint Appendix)

IN THE UNITED STATES DISTRICT COURT

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, et al.	[]	CV-89-03361 (E.D.N.Y.)(JBW)
Plaintiffs,	[]	
VS.	[]	[B-89-00559-CA (E.D.TEX.)]
DIAMOND SHAMROCK CHEMICALS COMPANY, et al.	[]	
Defendants.	[]	

AFFIDAVIT OF SHIRLEY IVY

SHIRLEY IVY, of Rt. 1, Huntington, Texas, 72949, being duly sworn testifies as follows:

1. I am named Plaintiff in the above captioned suit claiming damages from defendant chemical companies for injuries and death sustained as a proximate result of the exposure of Donald Ivy to dioxin and other chemicals found in Agent Orange (the "claims").

2. The foregoing death and injuries for which claims have been made in this action occurred or were manifested only after May 7, 1984.

3. Neither I nor Donald Ivy have ever actually agreed to settle our claims.

4. Neither I nor Donald Ivy received formal or informal notice of the existence of a class action lawsuit possibly involving our claims before May 8, 1984.

5. Neither I nor Donald Ivy received formal or informal notice of the right to "opt out" of a class action lawsuit possibly involving our claims before May 8, 1984.

6. Neither I nor Donald Ivy received formal or informal notice of the settlement of a class action lawsuit involving Agent Orange before exploring our legal recourse in 1988.

7. Neither I nor Donald Ivy have ever made any request for, nor received any payments from, funds provided pursuant to the settlement of a class action lawsuit involving Agent Orange.

8. Neither I nor Donald Ivy have ever actually authorized any attorney to enter into an agreement to settle our claims.

9. No party or attorney who may have purported to settle our claims for their "nuisance value" as part of a 1984 class action settlement of a group of Agent Orange claims did, or could have, provided adequate representation to Donald Ivy or me in presenting our claims.

10. My sole attorney in this matter is Robert M. Hager. He is not authorized to accept any service of process on my behalf, or any service except in the above-captioned lawsuit.

The foregoing affidavit is a true and accurate statement of my testimony.

Shirley Ivy
(signature)

Signed and sworn before me by Shirley Ivy this
22 day of February, 1991.

My commission expires on the 15 day of January 1993.

SIGNED: Janet S. LaSalle
(signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, et al.	[]	CV-89-03361 (E.D.N.Y.)(JBW)
Plaintiffs,	[]	
VS.	[]	[B-89-00559-CA (E.D.TEX.)]
DIAMOND SHAMROCK CHEMICALS COMPANY, et al.	[]	
Defendants	[]	

AFFIDAVIT OF SHIRLEY IVY

SHIRLEY IVY, of Rt. 1, Huntington, Texas, 72949, being duly sworn testifies as follows:

1. Neither I nor my late husband Donald Ivy or any of our children have ever lived in the state of New York.

2. Neither I nor any of our children and so far as to my knowledge Donald Ivy have ever been to the state of New York.

3. Neither I nor my late husband Donald Ivy or any of our children have ever conducted business in the state of New York.

4. Neither I nor my late husband Donald Ivy or any of our children have any contacts whatsoever in the state of New York.

5. All of us are from the state of Texas and have lived in and around Huntington all of our life.

Shirley Ivy
(signature)

Signed and sworn before me by Shirley Ivy this
27 day of February, 1991.

My commission expires on the 15 day of January 1993.

SIGNED: Janet S. LaSalle
(signature)

JAN 10 1994
OFFICE OF THE CLERK

No. 93-860

IN THE

Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED, ET AL.,
Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN AND WYOMING; THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA; AND THE DISTRICT OF COLUMBIA, IN SUPPORT OF CERTIORARI

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INTEREST OF *AMICI*

This brief *amici curiae* is submitted by 45 States and the District of Columbia. Our purpose is to inform this Court of the grave threat that the decision of the Second Circuit below poses both to the statutory jurisdictional framework of the federal courts and to core principles of judicial federalism. We agree with petitioners that this decision, which reflects a clear conflict between the circuits, embraces a drastic and disturbing removal doctrine, one that authorizes a federal court to disregard the seven specific removal provisions enacted by Congress and to remove a case from a state court whenever it suits the perceived needs of the federal court. *See* Petition at 2, 7-25.

In exercise of one of their most fundamental powers as sovereign States, *amici* have created judicial systems through which their citizens may seek redress for injuries done to them, and may thereby peacefully resolve disputes in accord with due process of law. Petitioners here, citizens of Texas, invoked the jurisdiction of the Texas court system to resolve tort claims arising solely under state law, only to have the federal courts accept removal of the suit and spirit it 1500 miles away to a federal tribunal in New York.

The courts below did not find that petitioners' case could have been brought in a federal district court in the first instance. Rather, the explanation proffered for this federal interference with state court litigation is the defendants' contention that the instant suit is precluded by a settlement in a prior federal class action — a routine claim that the district court below assumed to be beyond the ability of a state court to resolve. Such an assumption is an insult to state courts and a violation of the most fundamental principles of federalism. *Amici* thus submit this brief in defense of the substantial state interest in ensuring unfettered access by their own citizens to their own courts to resolve state law disputes,[1] without unwarranted, *ad hoc* interference by the federal judiciary.

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[1] The State of Texas wishes to draw the Court's particular attention to the "open courts" provision of its Constitution. *LeCroy v. Hanlon*, 713 S.W.2d 335, 338-41 (Tex. 1986).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves tort claims brought under Texas law in a Texas state court by Texas plaintiffs against a Texas defendant and other defendants. Defendants based their petition for removal and their motion for dismissal on the supposition that "the [petitioners'] claims have already been asserted and adjudicated in federal court." *Ryan v. Dow Chemical Co.*, 781 F. Supp. 902, 913 (E.D.N.Y. 1992); Appendix to Petition ("A___") A45. Examining its earlier judgment and orders in the *Agent Orange Product Liability Litigation* (hereafter "*Agent Orange Litigation*"), the district court agreed and, concluding that "the Settlement Agreement compromised their claims," 781 F. Supp. at 915; A49, dismissed all of petitioners' claims. *Id.* at 920; A59.

The remarkable thing about the district court's decision — and the aspect of that ruling that provoked the filing of a brief *amici curiae* by 21 States in the Second Circuit below — is that this routine preclusion issue was not litigated in the Texas state court where the suits were brought. Instead, the case was removed to a federal district court in Texas and then transferred by the Multidistrict Panel to the U.S. District Court for the Eastern District of New York, where the Settlement Agreement had been entered, and where the federal district court had reserved jurisdiction in order to disburse funds pursuant to the Settlement Agreement.

The district court opined that the question posed was: "[W]hether members of a class whose action was brought and is still pending in federal court can circumvent the effect of a federal judgment by bringing new actions in a state court relying exclusively on state law." 781 F. Supp. at 912; A42. The district court answered that question "in the negative." *Id.* The Second Circuit reached the same conclusion. Although the Second Circuit recognized in passing that the Texas state court had authority to "decid[e] the scope of the *Agent Orange I* class action and settlement," *Ivy v. Diamond Shamrock Chemicals Co.*, 996 F.2d 1425, 1431 (2d Cir. 1993); A9, and although the Second Circuit further conceded that it was "not unmindful of the fact that the All Writs Act is not a jurisdictional blank check," *id.*, it ultimately held that removal was justified because it thought that

the district court was the court "best situated" to determine the preclusive effect of its own prior rulings and because it believed that the district court was the court best able to "guard[] the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction." 996 F.2d at 1431; A9.

The Second Circuit's concerns are misplaced. If there has indeed been an attempt by a party bound by a prior federal class action (or any other kind of) judgment to relitigate the case in a state forum, then the attempt may be resolved in its entirety by the application of well-established preclusion doctrines, based on the meaning of the contract that settled the earlier litigation and in light of applicable rules and constitutional principles.

In our view, the defendants' odyssey from Orange County, Texas to Brooklyn, New York, and hence the instant petition for *certiorari* that we urge the Court to grant, raises a question altogether different than the one posed and answered by the courts below: *which* court decides the preclusive effect of a prior lawsuit? For as long as there has been a common law the answer to this question has been plain: whenever a prior judgment of a court in another jurisdiction (state or federal) is raised as a bar to litigation of a claim, the issue is decided by the court at hand, not referred back to the court that entered the original judgment. In our judicial system this rule is dictated by, among other things, fundamental principles of comity and federalism, and the Full Faith and Credit Clause, Art. IV, § 1.

The decision below has supplanted this principled and time-tested rule with a radical and new one: whenever a federal class action judgment is involved, *only* one judge — only the individual judge who "entered the [original] judgment," 996 F.2d at 1431; A9 — is qualified to decide the preclusive effect of that judgment. Furthermore, in order to effect this rule in this case the courts below had to follow a second rule, relying upon an expansive reading of the All Writs Act to hold that, regardless of what Congress may have intended in otherwise carefully circumscribing federal statutory removal jurisdiction, that Act provides an inexhaustible font of judicially divined removal jurisdiction. As convincingly explained at pp. 12-23 of the Petition, these

rules are not only contrary to common sense and centuries of common law judicial practice, but are also contrary to the statutory removal scheme, inconsistent with the Constitution, and destructive of judicial federalism.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN ORDER TO RESTRAIN THE LOWER FEDERAL COURTS FROM CREATING THEIR OWN REMOVAL JURISDICTION AND, IN SO DOING, INTRUDING UPON THE RIGHTS OF THE STATES AND DISREGARDING THE PRINCIPLES OF JUDICIAL FEDERALISM

This is a case about removal. Yet the district court opinion *did not even cite*, much less discuss, the statutory basis for removal jurisdiction. Instead, the district court simply opined that in its view the All Writs Act, 28 U.S.C. § 1651(a), "permits a federal court to remove state actions to federal court [even] in situations where *specific statutory removal authority is absent*." 781 F. Supp. at 918; A55 (emphasis added). On appeal, the Second Circuit agreed that "a district court, in exceptional circumstances, may use its All Writs authority to remove an *otherwise unremovable* state court case." 996 F.2d at 1431; A8 (emphasis added).

We agree with petitioners that these holdings cannot be squared with either the overall design or the unambiguous history of the statutory removal structure crafted by Congress. It is not surprising that the other circuits addressing this issue have rejected the Second Circuit's view. *See* Petition at 11-12 & n.14. Moreover, as petitioners note, there are significant grounds to question the Second Circuit's interpretation of the All Writs Act. *See* Petition at 12-19. The general federal question removal statute, 28 U.S.C. § 1441(a), provides that a district court may exercise jurisdiction on removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Thus, "a defendant may remove a case only if the claim could have been brought in federal court" in the first place. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986). But that requirement cannot be met in this case. Signifi-

cantly, the courts below did *not* hold that petitioners' claims could have been brought in a federal court, and with good reason: there was absolutely no basis for federal jurisdiction.

As the district court itself found, "diversity jurisdiction is lacking." 781 F. Supp. at 914; A47. Nor is federal question jurisdiction available under 28 U.S.C. § 1331. "Normally, removal based on federal question jurisdiction is improper unless a federal claim appears on the face of a well-pleaded complaint." *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.), *cert. denied*, 479 U.S. 885 (1986). No such federal claim exists in this case because, as the district court conceded, the complaint pleads only state law causes of action and "expressly disclaims reliance on federal law." 781 F. Supp. at 913; A45. Moreover, as a matter of law, no well-pleaded federal claim could appear on the face of the complaint because the Second Circuit had previously *held* that Agent Orange tort suits raise no claims under federal statutory or common law.[2] As the district court noted, the original Agent Orange class action involved state law claims exclusively, and federal subject-matter jurisdiction was predicated solely on diversity. 781 F. Supp. at 907; A34. Because petitioners' claims could not have been initially *brought* in a federal court, their claims could not have been subsequently *removed* to federal court under § 1441(a).

Any concern that petitioners are somehow "double-dipping" by attempting to relitigate claims that are barred by the result of

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[2] It was determined early in the class action that no federal statutory causes of action were available to Agent Orange victims. *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 737, 741-42 (E.D.N.Y. 1979), *aff'd in pertinent part*, 635 F.2d 987, 989 n.3, 991-92 n.2 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). At the same time, the Court of Appeals foreclosed the possibility of federal question jurisdiction under federal common law by specifically "reject[ing] the district court's conclusion that there is an identifiable federal policy at stake in this litigation that warrants the creation of federal common law rules." *Agent Orange Litigation*, 635 F.2d at 993. The Court of Appeals below also rejected the defendants' contention that plaintiffs' complaint was "artfully pleaded" and therefore violated the "well-pleaded complaint" rule. 996 F.2d at 1431; A8. Finally, the "well-pleaded complaint" rule specifically precludes the removal of a case based on the defendant's pleading of a *res judicata* defense, the very ground used by the courts below to remove this case. *Sarkisian, supra*, 794 F.2d at 761 n.10.

earlier litigation is no excuse to engineer new grounds for removal jurisdiction. "Double-dipping" is not a new or unusual threat and, as such, it has been adequately addressed for centuries by the common law doctrine of preclusion. A plaintiff who loses in one court and then sues on the same claim in another jurisdiction is subject to the defense that the matter is *res judicata*, "a thing adjudicated."

There is no sensible reason to suppose that the Texas court in which this suit was filed is incapable of handling the garden-variety preclusion issue presented here, which requires only the interpretation (under the applicable state law) of the contract that settled the class action lawsuit and the disposition of ancillary legal issues, such as class action procedures, personal jurisdiction, and due process. Indeed, the principles that animate our regime of judicial federalism and the fact that, consistent with those principles, state courts are deemed competent to resolve complicated questions of federal constitutional law, together mandate a supposition opposite to the one embraced by the courts below.[3]

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[3] Chief among those principles, of course, is the axiom that the Second Circuit seems to have forgotten, that the jurisdiction of the federal courts, and the powers of the federal government generally, are of designedly limited scope, particularly when such powers trench upon those of the States. *See, e.g, United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812) ("The powers of the general government are made up of concessions from the several states — whatever is not *expressly* given to the former, the latter expressly reserve.") (emphasis added).

Indeed, as recent historical scholarship makes clear, the 1787 debate over the ratification of the federal Constitution turned in large part upon Anti-Federalist demands, and Federalist concessions, that the federal courts be permitted to exercise only such jurisdiction as expressly authorized by the federal constitution and expressly provided by Congress, and to have such grants of authority narrowly construed, so as neither to abridge nor to frustrate the historic and plenary powers of the state courts. *The Debate on the Constitution* (Bernard Bailyn, ed., 1993). *See, e.g.*, John Marshall, *On the Fairness and Jurisdiction of Federal Courts* (June 20, 1788), in 2 Bailyn, *supra*, 730, 731-734; "Publius" [Alexander Hamilton], *The Federalist No. 82: State and Federal Courts: Concurrent Jurisdiction?* (May 28, 1788), in 2 Bailyn, *supra*, 493, 493-97; George Mason, *Fears [Concerning] the Power of Federal Courts: What Will Be Left to the States?* (June 19, 1788), in 2 Bailyn, *supra*, 720, 720-722; George Mason, *Objections to the Constitution* (Nov. 22, 1787), in 1 Bailyn, *supra*, 345, 347; Patrick Henry and James Madison, *Patrick Henry Elaborates His Main Objections and James Madison Responds* (June 12, 1788) in 2 Bailyn, *supra*, 673, 687.

The district court's unstated but critical assumption — that its prior judgment either would not be understood or would not be accorded full faith and credit by the Texas judiciary — is an affront to state sovereignty. As petitioners note, state courts have long been presumed competent to adjudicate questions of federal law, including federal constitutional law. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988). *See* Petition at 19-20 n. 28. "[P]roper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987).[4] Accordingly, "when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo, supra,* 486 U.S. at 149-50. *A fortiori,* this is the required course where the issue presented is one of routine common law rather than federal law, as is the case here.

After all, state courts and their colonial predecessors were handling preclusion matters without difficulty long before the federal courts and the federal Constitution even existed:

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[4] The abstention doctrine, in all its various forms, is but one example of the numerous constitutional and statutory limits on federal judicial power, limits that were designed and have been construed to ensure the continued vitality of state courts as meaningful and functioning entities. Viewed together, these doctrines demonstrate the great lengths to which this Court has gone in order to preserve the jurisdiction of state courts to adjudicate disputes — and in order to safeguard our system of judicial federalism. *See, e.g.,* the *Erie* doctrine (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)), the "adequate and independent state grounds" doctrine (*e.g., Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 619 (1875); *Michigan v. Long*, 463 U.S. 1032 (1983)), the "total exhaustion" rule (*e.g., Rose v. Lundy*, 455 U.S. 509, 518 (1982)), restrictions on federal habeas review (*e.g., Stone v. Powell*, 428 U.S. 465, 489-96 (1976); *Butler v. McKellar*, 494 U.S. 407, 414 (1990)); the concurrent jurisdiction doctrine (*e.g., Tafflin v. Levitt*, 110 S. Ct 792 (1990); *Yellow Freight System, Inc. v. Donnelly*, 110 S. Ct. 1566 (1990)), and the Eleventh Amendment (*e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Atascadero St. Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); *Employees v. Dep't of Public Health and Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)).

In light of the historical development and continuing importance of these and other judicial federalism doctrines, the Second Circuit's reliance on nebulous language in the All Writs Act to create new federal jurisdiction and to limit the power of state courts is surely wrong and must be reversed.

> Early in the history of our country a general rule was established that state or federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. . . . "[B]oth the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as *res judicata* in the other." . . . [W]hether or not a plea of *res judicata* in the second suit would be good is a question for the [second] court to decide.

Donovan v. City of Dallas, 377 U.S. 408, 412 (1964) (citations omitted). *See also Kline v. Burke Construction Co.*, 260 U.S. 229-30 (1922) ("Whenever a judgment is rendered in one of the courts . . . the effect of that judgment is to be determined by the application of the principles of *res judicata* by the [second] court."). Indeed, state courts have routinely been called upon to determine the existence and scope of the preclusive effect of prior federal class action judgments, and have competently undertaken those determinations. *See, e.g., In re Flowers v. Sullivan*, 545 N.Y.S.2d 289 (App. Div. 1989); *Johnson v. American Airlines, Inc.*, 157 Cal. App.3d 427, 203 Cal. Rptr. 638 (Cal. App. 1984); *Taylor v. Liberty Nat'l Life Ins. Co.*, 462 So.2d 907 (Ala. 1984); *Gagne v. Norton*, 453 A.2d 1162 (Conn. 1983).

The claim that a lawsuit is precluded by the outcome of earlier litigation is not a federal claim but a federal *defense*. *See Sarkisian*, *supra*, 794 F.2d at 761 n.10; *Ultramar America Ltd. v. Dwelle*, 900 F.2d 1412, 1416 n.6 (9th Cir. 1990); Fed. R. Civ. P. 8(c). And "since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 14 (1983). *See also Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). The departure from this time-tested rule by the courts below is an unprecedented, unwise, and condescending interference with state judicial authority.

The sole justification by the Second Circuit for its decision to uphold the district court's exercise of removal jurisdiction is an untenable expansion of the All Writs Act. The Second Circuit's construction of the All Writs Act in this case constitutes an unnecessary and unprincipled enlargement of federal court powers, one that is in conflict with the construction adopted by other circuits, and one that is deeply invasive of settled statutory and constitutional doctrine. The All Writs Act simply provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). We fully agree with petitioners that this statute has nothing to do with conferring removal jurisdiction or any other kind of jurisdiction over a case. *See* Petition at 16-17. The All Writs Act only specifies certain powers of federal courts *once they are properly exercising jurisdiction over a case*. *Id.* But we wish to add that, even if § 1651(a) had something to do with conferring jurisdiction, as opposed to "aid[ing]" jurisdiction already extant, its use in this case to dislodge the right of Texas courts to determine the preclusion issues involved here would still be improper.

The reason is simple. As this Court explained long ago, the language of the All Writs Act mandates not just one, but two, express conditions for the proper invocation of the statute. Not only must federal jurisdiction already exist, but "the mode of process[] must be agreeable to the principles and usages of law," specifically "the principles and usages of law as known and understood in the State courts at the date of [the] enactment" of the All Writs Act. *Riggs v. Johnson County*, 73 U.S. 166, 190 (1868). Given the long-settled practice of preclusion issues being decided by the second court, *no* exercise of power under § 1651(a) could ever be justified by the view of the courts below that the Texas courts simply cannot be trusted to adjudicate this issue properly. Simply put, the Second Circuit's All Writs removal doctrine is wholly inconsistent with the well-settled "principles and usages of law" regarding preclusion.

It bears emphasis that the All Writs Act has been consistently construed for more than two centuries as serving the quite limited function of enabling federal courts already in possession of jurisdiction to exercise supplementary remedial authority solely in aid of

that jurisdiction, and not as a vehicle for creating jurisdiction where none already exists. There is, accordingly, no warrant whatever for the Second Circuit's dramatically new and expansive rendering of that statute so as justify creation of federal jurisdiction, particularly where such federal jurisdiction comes at the expense of state court jurisdiction.[5]

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[5] This is especially so given this Court's circumspect reading of the Tenth Amendment, which pertinently provides that "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . . ." In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), this Court declined to read the Age Discrimination in Employment Act in such a fashion as to countenance interference with traditional policies of state judicial systems regarding the mandatory retirement of state judges. *Id.* at 2408. *See also New York v. United States*, 112 S. Ct. 2408, 2428 (1992) (Tenth Amendment precludes construction of federal statutes that would interfere with the "core" functions of state sovereignty, especially the ability of a state to "make and *apply* its own laws.") (emphasis added). *Gregory* and *New York v. United States* also stand for the postulate of statutory construction that Acts of Congress shall not read as impinging upon core state functions unless Congress provides a "clear statement" of precisely that intent. Indeed, in view of the inherently limited nature of federal courts and the importance of state court jurisdiction, in construing federal jurisdictional statutes this Court has endeavored always to read even express statutory grants of jurisdiction very narrowly, particularly when such grants even potentially impinge on the jurisdiction of state courts. *See, e.g., Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (limiting 28 U.S.C. § 1332 by requiring complete diversity); *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (limiting 28 U.S.C. § 1332 by requiring that all plaintiffs in a class action lawsuit based on diversity meet the minimal amount in controversy requirement). Thus, even when Congress has specifically fashioned a grant of federal jurisdiction, this Court has assiduously labored to protect the prerogatives of state courts. Accordingly, this Court should reject the Second Circuit's attempt to trump state court jurisdiction on the basis of a statute, such as the All Writs Act, which plainly was not intended by Congress to serve that end.

Moreover, particularly with respect to the statutory removal scheme created by Congress, this Court has been extremely vigilant in sheltering the powers of state courts by limiting the reach of federal courts. Thus, this Court has confined the ambit of the removal statute to its literal terminology, and has extended no flexibility for expanded jurisdiction. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) (limiting the reach of federal jurisdiction under 28 U.S.C. § 1441 by reading that section literally and narrowly so as to disallow removal by original "plaintiffs" even when they become counterclaim defendants); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) (reading 28 U.S.C. § 1441(c) narrowly so as to deny removal

Significantly, the courts below could not find a single case in which a federal district court had employed injunctive relief or had used any other power under the All Writs Act to effect the removal of litigation over a preclusion defense from a state court. Such a radical exercise of federal judicial power over state court proceedings has heretofore been unprecedented precisely because it is both unprincipled and entirely unnecessary. It is a "basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).[6]

If defendants are indeed entitled to prevail on their preclusion defense, as they contend, then an entirely adequate and prompt remedy at law awaits them when they raise that defense in the courts of Texas where this action was brought. This Court need not even go so far as to invoke *Younger* abstention in order to conclude that the routine federal judicial intervention augured by the decision below constitutes a breach of the walls of comity and federalism that have been erected by Congress and this Court to ensure the continued vitality of our nation's parallel state and federal judicial systems. *See Pennzoil v. Texaco*, 481 U.S. 1 (1987).

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to non-diverse defendant in a case where plaintiff has "separate and independent claims," one against a diverse defendant and the other against a non-diverse defendant). *See generally* Erwin Chemerinsky, FEDERAL JURISDICTION, § 5.5, at 289 (1989); John Friedenthal, M. Kane, and Arthur Miller, CIVIL PROCEDURE 63 (1985).

Given this Court's reluctance to find authority for federal jurisdiction even where specific textual support exists for such a finding, *a fortiori*, this Court should grant review in this case in order to strike down the Second Circuit's appropriation of jurisdiction under the All Writs Act, where no textual support is present at all. By so doing, this Court could affirm the traditional jurisdictional preserve of state courts and strike down the Second Circuit's arrogation of authority to itself.

[6] *See also Speight v. Slayton*, 415 U.S. 333, 335 (1974) (defendants "could obtain full relief in the state court proceeding merely by moving to dismiss the state action, in accord with state procedural rules . . . . If that is the case, [they] could not now make any showing of irreparable injury by reason of the state court proceeding, and such a showing is of course required before the federal court could grant the equitable relief, apart from any special considerations involved in *Younger v. Harris*").

Given the circumstances of the case at bar, to allow the decision below to stand would be to invite every federal district court, in its discretion, to circumvent the removal statutes and other specific jurisdictional legislation and to transform the All Writs Act from a carefully cabined mechanism for assisting courts that already have jurisdiction into a general grant of federal jurisdiction and a broad license to interfere with state court proceedings. The decision below constitutes a serious intrusion on the state courts and an ill-advised erosion of judicial federalism. A grant of certiorari is therefore in order.

CONCLUSION

Several years ago the Second Circuit permitted a federal district court to step into state court litigation in Texas between two oil companies on the theory that the state courts were incapable of managing, or could not be trusted to handle, a dispute involving issues of federal law. An $11 billion judgment against one of the world's largest oil companies was at issue, and the federal district court was convinced that the stakes were simply too high to leave resolution of the federal issues involved to run-of-the-mill state tribunals. Despite the availability in that case, unlike here, of a federal cause of action under 42 U.S.C. § 1983, this Court unambiguously condemned that federal judicial condescension and promptly reversed the district court's interference, remanding the parties to the state courts from whence they came. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

In an eerily parallel situation, in this case the Second Circuit has permitted a district court to effect a similar invasion of the prerogatives of state courts, this time by stripping a Texas trial court of jurisdiction over a case which (looking beyond the public debate over justice for Vietnam veterans) turns largely on garden-variety tort issues. Here, the invasion of federalism was rationalized based on the defendants' untested assertion that petitioners' state claims are barred by the preclusive effect of an earlier settlement. Resolution of that issue requires no analysis of a federal claim, but only the interpretation of a prior federal diversity case settlement.

Nor should the determination of the preclusive effect, if any, of the settlement be reserved to the federal courts on the ground that

petitioners' state actions are barred not by some ordinary federal judgment, but by a "federal class action judgment." 781 F. Supp. at 914; A48. Just as this Court stepped into the *Pennzoil* case to reject the notion that well-established principles of federalism may be disposed of whenever billions of dollars in judgments are at stake, this Court should reject the Second Circuit's notion that well-established federalism rules regarding removal may be superseded whenever millions of dollars in claims are at stake and these claims turn on the preclusive effect of an earlier mass-tort class action settlement.

The Second Circuit's decision invites state court defendants and federal district courts to remove cases from state courts whenever a prior federal judgment of any apparent importance is implicated. At minimum, if left undisturbed the decision below will exert an enormous magnetic pull: nationwide class actions typically may be filed in any circuit, and class action plaintiffs interested in offering maximum settlement value to defendants are likely to file within the Second Circuit as long as it remains the odd man out on this issue, and as long as the circuit conflict is as lopsided as it has thus far been. If other circuits that have so far taken a different view follow the Second Circuit (as some district courts in other circuits are already doing, *see* Petition at 11 & n.13), then other powerful magnets for such forum-shopping will exist. In any event, the circuit conflict itself is ample reason for review by this Court.

Apart from the conflict in the circuits, the expansion of federal jurisdiction embraced by the decision below is an illegitimate judicial amendment of Congress's removal statute, an unwelcome, unnecessary and vexatious source of new cases for already swamped federal dockets, and — most important to these *amici* — an invasion of state judicial independence and an insult to state courts throughout the nation, which are perfectly capable of deciding whether a state law claim is barred by a prior federal judgment, regardless of the stakes in the case. Accordingly, certiorari should be granted.

Respectfully submitted,

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Nos. 93-860 and 93-1035

In the Supreme Court of the United States

October Term, 1993

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, deceased, et al.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.,
RESPONDENTS.

RONALD L. HARTMAN, ET AL.,
PETITIONERS,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY, ET AL.
RESPONDENTS.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are veterans who claim that they were injured by exposure to the herbicide Agent Orange while serving in the Vietnam War. They were parties to a class action in federal district court that was settled in 1984 by the creation of a $180 million fund against which they are eligible to assert claims. The order implementing the settlement enjoins petitioners and other class members from undertaking further litigation against the defendants in any court based on exposure to Agent Orange in Vietnam. In clear violation of this order, petitioners brought suit against defendants in Texas state court. Rather than hold petitioners in contempt or enjoin the state proceeding, the federal district court administering the settlement agreement accepted removal of petitioners' suit to federal court and itself adjudicated petitioners' attack on the settlement. The questions presented are:

1. Whether state court suits brought by disgruntled parties to a federal class action, which could be enjoined by the federal court to protect the integrity of the federal judgment and the settlement fund being administered by the court, may instead be removed pursuant to the All Writs Act, 28 U.S.C. § 1651.

2. Whether petitioners were properly included within the plaintiff class in the federal class action.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.1 of the Supreme Court Rules, respondents hereby state:

1. *Diamond Shamrock Chemicals Company*. On September 4, 1986, all the outstanding stock of Diamond Shamrock Chemicals Company ("DSCC") was sold to Oxy-Diamond Alkali Corporation, a company under the ownership of Occidental Petroleum Corporation. DSCC (renamed Occidental Electrochemicals Corporation) was subsequently merged into Occidental Chemical Corporation, an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, which is publicly traded on the New York Stock Exchange.

2. *The Dow Chemical Company*. The Dow Chemical Company is a publicly traded corporation that has the following publicly traded subsidiaries and affiliates:

Marion Merrell Dow, Inc.
Destec Energy, Inc.

3. *Hercules Incorporated*. Hercules Incorporated is a publicly held corporation whose shares are traded on the New York Stock Exchange. It has no parent or subsidiary company required to be listed herein.

4. *Monsanto Company*. Monsanto Company has no publicly owned parent company or affiliates. The following Monsanto Company subsidiaries have issued shares to the public:

Southwall Technologies, Inc.
The Macneal-Schwendler Corp.
Micro General Corp.
Dura Pharmaceutical
Gensia Pharmaceuticals
Microfluidics

5. *T.H. Agriculture & Nutrition Co., Inc.* T.H. Agriculture & Nutrition Co., Inc. is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Philips Electronics N.V., a publicly held corporation based in The Netherlands.

6. *Uniroyal, Inc.* Prior to the commencement of the above-captioned actions, Uniroyal, Inc. was a publicly held company. During the course of these actions the shares of Uniroyal, Inc. were acquired by CDU Holding, Inc. and Uniroyal was liquidated. CDU Holding, Inc. has no subsidiaries.

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COUNTERSTATEMENT OF THE CASE

The long and complex history of the *Agent Orange* litigation is reflected in part by the ten previous unsuccessful certiorari petitions filed in the case.[1] Accounts of various phases of the litigation are in print. See, *e.g.*, Pet. App. A28-A33 (citing some of the "hundreds of published and unpublished decisions" rendered in the litigation).[2] The following statement focuses on the facts pertinent to petitioners' current claims. Petitioners' account of the relevant facts is distorted and misleading.

A. The *Agent Orange* Class Action

In 1978, Vietnam veterans and family members began filing individual and representative actions in federal and state courts around the country against respondents, manufacturers of the herbicide Agent Orange, for injuries allegedly caused by the veterans' exposure to Agent Orange in Vietnam. Ultimately some 600 suits, involving 15,000 named plaintiffs resident in virtually every state of the nation and several foreign countries, were

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[1] See *Dow Chemical Co. v. Brown*, petition for cert. filed, 61 U.S.L.W. 3195 (U.S. Sept. 22, 1992) (No. 92-438) (remand of civilians' *Agent Orange* claims unreviewable), cert. denied, 113 S. Ct. 599 (1992); *In Re "Agent Orange" Product Liability Litig. ("Agent Orange")*, 818 F.2d 145 (2d Cir. 1987) (approving certification and settlement of the class action), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 179 (2d Cir. 1987) (approving plan for distributing settlement fund), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 187 (2d Cir. 1987) (affirming dismissal of opt-out claims), cert. denied, 487 U.S. 1234 (1988); *Agent Orange*, 818 F.2d 201 (2d Cir. 1987) (affirming dismissal of direct claims against the United States), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 210 (2d Cir. 1987) (affirming dismissal of Agent Orange claims of certain civilians), cert. denied, 484 U.S. 1004 (1988); *Agent Orange*, 818 F.2d 216 (2d Cir. 1987) (overturning fee arrangement among plaintiffs' counsel), cert. denied, 484 U.S. 926 (1988); *Agent Orange*, 821 F.2d 139 (2d Cir.) (affirming order unsealing confidential pretrial discovery materials), cert. denied, 484 U.S. 953 (1987); *In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.) (denying mandamus seeking to vacate class certification), cert. denied, 465 U.S. 1067 (1984); *Agent Orange*, 635 F.2d 987 (2d Cir. 1980) (reversing finding of federal question jurisdiction), cert. denied, 454 U.S. 1128 (1981).

[2] "Pet. App." refers to the appendix to the certiorari petition in No. 93-860. "ASA" refers to the Supplemental Appendix filed by respondents as appellees in the court of appeals.

transferred by the Panel on Multidistrict Litigation to the Eastern District of New York for coordinated and consolidated pretrial proceedings. *In re "Agent Orange" Product Liability Litigation*, MDL No. 381.

The transferee court's ruling that plaintiffs' claims arose under federal common law and that the court accordingly had federal question jurisdiction was reversed by a divided panel of the court of appeals, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981), and the litigation thereafter proceeded on the basis of diversity jurisdiction. 506 F. Supp. 762 (E.D.N.Y. 1980).

1. Class Certification And Settlement

Plaintiffs argued from the outset for a broad class, contending that *all* Vietnam veterans had been exposed to Agent Orange and had thereby suffered an "injury" compensable under the law of torts. See Pet. App. A13. Thus, the amended complaints filed in the lead action claimed that the action was brought on behalf of 2.4 million veterans who had served in Vietnam, all of whom allegedly had been exposed and injured, including "those individual veterans manifesting no symptoms of illness and disease at present, but at risk of genetic and somatic damage." ASA 1, 19-20.

Defendants opposed class certification and moved to dismiss the so-called "at risk" or "after-manifested" claims. Plaintiffs defeated the motion, arguing successfully in both the district court and Second Circuit (see 635 F.2d at 992-93 n.10) that "[n]ot all courts adhere to the rule that an injury and damage are not compensable simply because they are not presently and immediately observable." ASA 350.

In December 1980 the district court determined to certify a plaintiff class in the lead action under Fed. R. Civ. P. 23(b)(3). The court proposed to define the class as

> persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom.

506 F. Supp. at 788. This was, in the court's view, "the broadest possible class" (*ibid.*), one that included "over two million Vietnam

veterans and their families." *Id.* at 791. However, no certification order issued at the time.

In December 1983, after extensive discovery and motions and over defendants' objection, the district court formally certified a Rule 23(b)(3) "common question" class with opt-out rights to address the common issues of general causation and the military contractor defense. Adhering to its intent to define the class broadly, the court modified the language of the definition so that the class consisted of

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange. * * * The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

100 F.R.D. 718, 729 (E.D.N.Y. 1983). The phrase "persons * * * who were injured" was chosen in response to defendants' objection that the earlier definition ("persons who claim injury") lacked an objective standard. See ASA 403-05; 100 F.R.D. at 728-29.

The district court ordered plaintiffs' counsel to notify class members of the certification and the right to opt out -- by mail where feasible, and also by radio, television, magazine and newspaper announcements in this country, Australia and New Zealand. 100 F.R.D. at 729-31. The court of appeals denied defendants' mandamus petition to vacate the class certification and notice plan, and this Court declined review. 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984).

On May 7, 1984, the day the trial was to begin, the parties reached a tentative settlement. The Settlement Agreement provided for the establishment of a $180 million settlement fund to cover all claims arising then or in the future out of veterans' exposure to Agent Orange in Vietnam, and provided that class members' exclusive remedy against defendants was a claim against the fund. The Settlement Agreement made clear that "[t]he [c]lass specifically includes persons who have not yet manifested injury" (597 F.

Supp. 740, 865 (E.D.N.Y. 1984)), and it permanently barred class members from instituting or maintaining any action against defendants based on exposure to Agent Orange. A reserve of $10 million out of the $180 million was created to indemnify the defendants from any state court judgments obtained by "opt-out" class members. Any part of the reserve not used reverts to the benefit of the class members. 611 F. Supp. 1396, 1437 (E.D.N.Y. 1985).

A settlement notice was directed to class members, some of whom objected to the settlement and moved for certification of a sub-class of objectors. The objectors argued in part that the proposed settlement improperly broadened the class definition to include "after-manifested" or "at risk" claimants. ASA 642-66; 899-902. The district court denied the objectors' motion, finding that "[n]o purpose would have been served by appointing counsel for a subclass of disappointed claimants." 597 F. Supp. at 757; see also ASA 729-33 ("I defined the class in my class action opinion and then notice went out on that class as then defined. * * * I believe the original language properly interpreted included after manifestations.").

After extensive, nationwide fairness hearings, the district court granted final approval to the Settlement Agreement in June 1985 (611 F. Supp. 1296, 1347 (E.D.N.Y. 1985)), having found that the weaknesses in plaintiffs' case and the strength of defendants' defenses were decisive factors. See 597 F. Supp. 740 (E.D.N.Y. 1984). On July 9, 1985, the court entered an Order and Final Judgment of Dismissal, which directed consummation of the settlement "in accordance with its terms," and (1) dismissed with prejudice all claims by class members; (2) barred all class members from instituting or maintaining any action against defendants arising out of the subject matter of any of the class action complaints; and (3) retained jurisdiction over the class action for the purpose of maintaining, administering and distributing the settlement fund. See 618 F. Supp. 623, 624 (E.D.N.Y. 1985). Under the distribution plan adopted by the court, 75% of the $180 million settlement fund is to be paid to class members for nontraumatic death or total disability of class member veterans who were exposed to Agent Orange, with most of the remainder allocated to

a class assistance program to fund projects and services of benefit to the entire class.

2. *The Second Circuit Affirms The Class Certification and Settlement*

Appeals were taken from various rulings and the final judgment of the district court. Specifically assigned as errors were the certification of the class, the inclusion in the class definition of persons with "after-manifested" injuries, the adequacy of notice, the adequacy of the representation given the absent class plaintiffs and the fairness of the settlement. The court of appeals affirmed the certification and ensuing settlement of the class action in all relevant respects. 818 F.2d 145 (2d Cir. 1987). This Court denied multiple petitions for certiorari. 484 U.S. 1004 (1988).

The Second Circuit upheld certification of a Rule 23(b)(3) class because of the centrality of one major issue -- the military contractor defense. 818 F.2d at 166. It agreed with the district court that the interests of all class members, regardless of the nature of their claims, were identical with regard to the facts and law relevant to that potentially dispositive defense, *id.* at 166-69, and that class members with actual notice would adequately have represented class members unaware of the action. *Id.* at 167-69.

In affirming the adequacy of notice, the Second Circuit held that the district court's notice plan was a "creative approach appropriate to this unique case." 818 F.2d at 167. The court rejected the argument that all 2.4 million class members should have been sent letter notice, stating that "far fewer than that number were exposed to Agent Orange" and that "many of the members of the class were unknown and could not be located through reasonable efforts." *Id.* at 169. The court took judicial notice of the widespread publicity the litigation had received and concluded that "no practical problem exists as to the adequacy of the notice." *Ibid.*

Finally, the Second Circuit approved the settlement as fair in light of the pervasive factual and legal difficulties faced by the plaintiffs in establishing causation and exposure to Agent Orange and in avoiding the statute of limitations (818 F.2d at 172-173), as

well as the court's "conviction that the military contractor defense absolved the [defendants] of any liability." *Id.* at 151.

After this Court denied certiorari, the payment program and class assistance program began making disbursements and grants; by then, the settlement fund had grown (with interest) to $240 million. As of January 1994, the payment program has paid more than 38,000 claims and disbursed more than $164 million to disabled veterans and their survivors. Letter from Special Master Deborah E. Greenspan to Judge Jack B. Weinstein (Jan. 14, 1994) ("Special Master's Letter"). *More than 55% of all disability claims paid by the fund were for disabilities with onset after May 7, 1984; and more than 61% of all survivor claims paid by the fund were for deaths occurring after May 7, 1984.* Indeed, two of the named plaintiffs in the *Ivy* case, who are petitioners herein, filed claims against the fund and received benefits in 1991. See Pet. App. A44-A45. In addition, through November 1993, the class assistance program had awarded over $40 million in grant funds, benefiting more than 148,000 veterans and family members nationwide. Fifth Annual Report of the Agent Orange Class Assistance Program (Nov. 1993), at pp. 1, 10.

B. *Ivy* and *Hartman*

The two cases now before the Court were begun in Texas state court in 1989 and 1990. Claiming to represent a class of those similarly situated, petitioners alleged that their injuries from exposure to Agent Orange had manifested themselves or been discovered only after the deadline to opt-out of the *Agent Orange* class and that they therefore were not members of that class and were not bound by the class action dismissal order. Purporting to rely solely on state law, petitioners sought compensatory and punitive damages from defendants and the creation of a fund to monitor the health of all Agent Orange-exposed Vietnam veterans and their family members for the next 20 years. ASA 760, 776-77, 791, 805.

Defendants removed the lawsuits to federal court on federal question grounds (claiming "artful pleading" and "complete federal preemption"), and the actions were transferred by the Judicial Panel on Multidistrict Litigation to the Eastern District of New York. In January 1990 the *Ivy* plaintiffs petitioned the Second Circuit for a

writ of mandamus directing the MDL Panel to vacate the transfer order for lack of federal subject matter jurisdiction. The court of appeals denied the petition, ruling that subject matter jurisdiction should be decided in the first instance by the transferee court. *In re Ivy*, 901 F.2d 7 (2d Cir. 1990).

In October 1990 plaintiffs moved to remand their actions to Texas state court. In December 1990 defendants moved under the All Writs Act for an order permanently enjoining petitioners from prosecuting these actions because petitioners were members of the *Agent Orange* class and therefore were bound by the anti-litigation provision of the district court's order approving the Settlement Agreement. Defendants also moved to dismiss petitioners' claims and for other relief.

1. Dismissal By The District Court

The district court ruled in October 1991 that it did have subject matter jurisdiction of petitioners' claims, and it denied petitioners' motion to remand and granted defendants' motion to dismiss. Pet. App. A47-A56. The court first held that petitioners "are members of the *Agent Orange* class." *Id.* at A49. It observed that, in approving the class certification and settlement, both it and the court of appeals had previously ruled that the class definition included persons with "after-manifested" injuries. The court rejected petitioners' assertion that after-manifested claimants could not properly have been included in the class because of inadequate notice and representation. *Id.* at A54.

Having determined that petitioners were members of the *Agent Orange* class, the district court went on to conclude that petitioners' new lawsuits violated the injunction against such litigation contained in the class action final judgment; that the suits constituted a "direct threat to the continuing viability of the judgment settling the class action"; and that, if successful, the suits would "automatically reduce the sums available for other class members." Pet. App. A42, A49-A52, A55. Petitioners' claims, the court observed, "are a challenge to the integrity of the Settlement Agreement and the authority of this court." *Id.* at A51.

In these circumstances, the district court held that it had "the power and the obligation to protect and effectuate its orders and

final judgments in the *Agent Orange* litigation." Pet. App. A51. The court noted that if the *Ivy* and *Hartman* cases had remained in state court, it would have had authority under the All Writs Act to enjoin any state court proceedings inconsistent with the court's prior orders. *Id.* at A55. Taking jurisdiction of the cases after they were voluntarily removed was a "less drastic, and therefore preferable result." *Ibid.* (quoting *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 864 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989)). In view of the foregoing, the court said that it "need not address defendants' motion for a permanent injunction." Pet. App. A56.

2. *The Second Circuit Affirms The Dismissal*

The Second Circuit affirmed the dismissal of petitioners' complaints, holding that it was "crystal clear" (Pet. App. A10) that the district court had certified a class in 1984 that included veterans who had been exposed to Agent Orange but had not yet manifested injury.

> There * * * can be no question concerning the district court's intent or that of the parties to the Settlement Agreement. 'At risk' veterans, i.e., victims with no visible symptoms, were included in the plaintiff class.

Id. at A14. Indeed, the court of appeals noted that, "[f]rom the very outset of the litigation in *Agent Orange I*, the plaintiffs adopted this meaning and urged it repeatedly upon the district court" (*id.* at A13), and that it had recognized the propriety of including "at-risk" veterans in its 1987 opinion affirming the class settlement. The Second Circuit rejected petitioners' current arguments against class membership as "no stronger now than they were when made in 1987." *Id.* at A14.

The court of appeals also ruled that, given "the 'exceptional circumstances' surrounding the instant case," and the need "'to protect or effectuate' the district court's *Agent Orange I* judgment," removal of petitioners' suits to federal court was a proper use of federal judicial power under the All Writs Act. Pet. App. A8-A10. The court stated that "[i]f Agent Orange victims were allowed to maintain separate actions in state court, the deleterious effect on the

Agent Orange I settlement mechanism would be substantial" and that the parties to the settlement -- including petitioners -- "implicitly recognized this when they agreed that all future suits by class members would be permanently barred." *Ibid.*

Finally, the Second Circuit rejected petitioners' attack on the class notice, stating that it had held that the notices were adequate in its opinion approving the settlement and that its "view has not changed." Pet. App. A16. The court of appeals also rejected plaintiffs' claims of inadequate representation, noting that petitioners "do not challenge the qualifications of the *Agent Orange I* class counsel" and that "their conflict-of-interest claims are unpersuasive." *Id.* at A17. The court explained that it would ordinarily have considered the appointment of a guardian to represent the interests of absent claimants with questionable injuries, but that such additional protections were unnecessary here given the

> unique circumstances surrounding *Agent Orange I* -- in particular, the even-handed treatment of both identified and unidentified legitimate claimants in the *Agent Orange I* settlement and the dim prospects of success both then and now * * *.

Id. at A21. In sum, the court concluded that the "fundamental fairness of the *Agent Orange I* settlement remains unshaken" and that the chances of recovery by Agent Orange plaintiffs "are nearly as speculative today as they were at the time of settlement." *Ibid.*

ARGUMENT

Petitioners' counsel, presumably aware that this case is driven by a unique set of facts and involves no issue on which the lower courts disagree, have presented questions that vastly distort and overstate what the court of appeals actually held. Contrary to the implicit premise of the first question stated in each petition, the Second Circuit did not confer broad discretion on federal judges to invoke the All Writs Act to remove otherwise unremovable cases from state court whenever they perceive a need to do so. As for the questions related to the merits of the inclusion of petitioners in the *Agent Orange* class (question 2 in *Ivy* and questions 4-5 in *Hartman*), the briefest comparison of petitioners' highly slanted

formulations to the Second Circuit's actual ruling readily shows that the case does not present the issues posed by petitioners. The gross distortions embodied in the formulation of the questions presented eloquently testify to the unsuitability of these cases for this Court's review.

Similarly, petitioners' arguments gloss over several critical factors that demonstrate the uniqueness and narrowness of the Second Circuit's decision. Petitioners barely mention that it was an indispensable ingredient of the global settlement of the *Agent Orange* class action that the settlement, which required defendants to create a $180 million fund to benefit class members, would mark an end to *all* litigation by Vietnam veterans and their families of claims arising from exposure to Agent Orange. To this end, in approving the final settlement, the district court entered an order barring class members from filing suit in the future in any court seeking remedies from defendants for injuries allegedly caused by exposure to Agent Orange during the Vietnam War.

Petitioners bury in a footnote their concession that they are members of the plaintiff class that entered into this settlement. Ivy Pet. 7 n.8. They do not mention that many thousands of the claimants whom petitioners purport to represent -- including two of the named petitioners -- have already claimed and received benefits from the settlement fund. Nevertheless, in clear violation of the federal court order implementing the settlement, petitioners brought these class actions in Texas state court seeking to hold defendants liable for injuries suffered as a result of exposure to Agent Orange in Vietnam. Rather than holding petitioners in contempt or enjoining the state court proceedings, as it could have done, the district court took the far less intrusive step of accepting removal of the cases to federal court and adjudicating petitioners' numerous attacks on the settlement.

The district court's actions unquestionably were correct in the unique circumstances of this case, do not conflict with the decision of any other court, and raise no legal issue warranting further review. This Court has held that a district court has authority under the All Writs Act to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S.

159, 172 (1977). As the Second Circuit explained (Pet. App. A9) (emphasis added):

> Given the "exceptional circumstances" surrounding the instant case, issuance [of the writ] was a proper exercise of judicial discretion. The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it already had decided, and guarding the integrity of its rulings in complex multidistrict litigation over which it had retained jurisdiction.*

The Second Circuit also correctly rejected petitioners' challenges to the wording of the class notice and to the adequacy of their representation by class counsel. In finding the notice sufficient and the representation adequate, the court of appeals relied, among other things, on the fact that persons with before-manifested and those with after-manifested injuries were identically situated with respect to the military contractor defense, and that the settlement fund conferred equal benefits on both groups.

In sum, contrary to petitioners' rhetoric, the courts below did not employ the All Writs Act as an independent and free-wheeling basis for federal jurisdiction (which already existed with respect to these petitioners by virtue of their membership in the class) and did not countenance class action procedures that raise any legal question of importance beyond the specific facts of this case. If petitioners were permitted to bring collateral attacks on the *Agent Orange* settlement in state court, it would render worthless the "anti-litigation" provisions of the Settlement Agreement, to which petitioners were parties, and would jeopardize the continued validity of the entire settlement, pursuant to which some $164 million has already been expended for the benefit of class members. The courts below acted responsibly, and well within their authority, in preserving the integrity of this decade-old federal court judgment.

I. THE DISTRICT COURT APPLIED SETTLED PRINCIPLES GOVERNING THE ALL WRITS ACT TO GRANT A REMEDY APPROPRIATE TO THE EXCEPTIONAL FACTUAL CIRCUMSTANCES OF THIS CASE

Petitioners assert that the Second Circuit has radically "transform[ed] the All Writs Act into a general grant of federal jurisdiction," giving federal district judges unbridled discretion to remove unremovable cases from state courts "when the need arises." Ivy Pet. 2. In fact, the Second Circuit has simply followed this Court's settled precedents that a federal court has the power under the All Writs Act[3] in "exceptional circumstances" to issue such writs as may be "necessary or appropriate" to "effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172. Compare petitioners' overblown and deceptive assertions with the actual statements of the Second Circuit:

PETITIONERS' ASSERTIONS	SECOND CIRCUIT OPINION
In the words of the Second Circuit, the All Writs Act permits district judges "to remove an otherwise unremovable state court case" in the discretion of the district judge, "when the need arises." **A8-A9**. Ivy Pet. 2.	A district court, *in exceptional circumstances*, may use its All Writs authority to remove an otherwise unremovable state court case in order to "effectuate and prevent the frustration of orders it has previously issued *in its exercise of jurisdiction otherwise obtained.*" *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).
[T]he [Second Circuit] made clear that district judges are free to resort to All Writs	

[3] The All Writs Act grants federal courts the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

removal in the "exercise of judicial discretion" whenever they believe "'the need arises.'" **A9**.

Ivy Pet. 21.

[A]ccording to the Second Circuit, [the All Writs] Act provides an independent source of authority for subject-matter jurisdiction on removal.

Ivy Pet. 15.

Pet. App. A8 (emphasis added).

In so holding, we are not unmindful of the fact that the All Writs Act is not a jurisdictional blank check which district courts may use whenever they deem it advisable. "Although that Act empowers federal courts to fashion *extraordinary remedies when the need arises*, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Given the "exceptional circumstances" surrounding the instant case, issuance was a proper exercise of judicial discretion.

Pet. App. A9 (emphasis added).

Thus, the Second Circuit did not announce "a radical new removal doctrine." Ivy Pet. 2. Rather, it carefully applied this Court's decisions construing the All Writs Act to the exceptional factual circumstances of this case. In approving use of the Act, the court of appeals emphasized that this case involved:

- Ongoing federal proceedings implementing a federal class action settlement;

- A federal court order barring class members from filing state court actions;
- Petitioners' blatant violation of that order, resulting in
- A direct threat to the viability of the ongoing federal proceedings and the continued administration of the settlement fund.

Pet. App. A9-A10. Once the Second Circuit's decision is accurately stated, it is apparent that that decision is plainly correct and completely in accord with the decisions of this Court and the other courts of appeals. Review of this unique case would provide little guidance to courts in future cases. In such circumstances, this Court should not rush to consider petitioners' distorted version of the removal and All Writs Act issues.

A. There Is No Conflict Among The Circuits

It is highly revealing that petitioners relegate to a footnote their assertion (Ivy Pet. 11 & n.14) that the Second Circuit's decision conflicts with cases from the Fifth, Ninth, and Tenth Circuits. There is no conflict whatsoever. Both the decision below and the allegedly conflicting cases follow this Court's long-settled rule that the All Writs Act permits federal courts to issue writs "necessary or appropriate" in aid of "jurisdiction otherwise obtained" but does not itself grant original federal jurisdiction.[4] *New York Telephone*, 434 U.S. at 172. None of these cases criticizes any of the others, and there is no underlying disagreement in principle, even in *dicta*.

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[4] Many of the cases cited by petitioners do not involve removal at all and merely restate this general rule. See *Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1971), cert. denied, 406 U.S. 945 (1972) (All Writs Act "does not confer original jurisdiction, but rather, prescribes the scope of relief that may be granted when jurisdiction otherwise exists"); *Brittingham v. U.S. Comm'r of Internal Revenue*, 451 F.2d 315, 317 (5th Cir. 1971) (All Writs Act empowers federal courts "to issue writs in aid of jurisdiction previously acquired on some other independent ground"); *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1355 (10th Cir. 1972) (All Writs Act "does not operate to confer jurisdiction; ancillary jurisdiction is provided where jurisdiction is otherwise already lodged in the court").

The only two circuits that have considered removal in the context of the All Writs Act, the Second and the Ninth, are in accord. Both circuits assume that removal is one of the remedies potentially available under the Act in an appropriate case. Both circuits recognize *New York Telephone* as controlling authority and simply apply it to the facts presented. See Pet. App. A8-A9 (citing *New York Telephone*); *Westinghouse Electric Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993) (same); *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989) (same). See also *United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992).

Under *New York Telephone*, the courts must determine whether removal is "necessary or appropriate" to "effectuate and prevent the frustration of orders [a federal court] has previously issued in its exercise of jurisdiction otherwise obtained." 434 U.S. at 172. In this case, the district court "otherwise obtained" jurisdiction over the parties and the subject matter based on its continuing jurisdiction of the *Agent Orange* class action. See Pet. App. A49-A51. (It bears repeating that petitioners do not challenge the conclusion of both lower courts that they are members of the *Agent Orange* class. Ivy Pet. 7 n.8). Finding that the present suits were "a direct threat" to its orders in ongoing federal proceedings, the court accepted removal under the All Writs Act to "effectuate and prevent the frustration" of the Settlement Agreement and to enforce its order barring relitigation of *Agent Orange* claims by class members. Pet. App. A54-A55. The Second Circuit agreed, holding that the district court properly invoked the All Writs Act to "guard[ ] the integrity of its rulings in complex multidistrict litigation *over which it had retained jurisdiction*." *Id.* at A9 (emphasis added).

In *Westinghouse Electric*, by contrast, the Ninth Circuit determined that the particular state court proceedings at issue would *not* in fact interfere with "the interpretation or the enforcement" of a prior federal protective order. 992 F.2d at 937. Based on that factual determination, it denied removal under the All Writs Act, applying the same *New York Telephone* standard that the Second Circuit employed in this case.

In sum, petitioners' lengthy academic discussion (Ivy Pet. 11-23) of the history of removal statutes and the All Writs Act is wholly beside the point. The Second Circuit did *not* grant "permission to remove cases whenever district judges find 'exceptional circumstances'" (Ivy Pet. 19) and it did *not* ignore the fundamental principle that "only Congress's jurisdictional statutes can authorize jurisdiction in a case" (*id.* at 11). The court of appeals explicitly held that "Judge Weinstein has continuing jurisdiction over the *Agent Orange I* class action, not only to administer the settlement fund, but also to ensure that the Settlement Agreement as a whole is enforced according to its terms." Pet. App. A10 (citations omitted). Petitioners do not take issue with this conclusion. On the facts of this case, no circuit would have reached a contrary result.

B. The District Court Had Power Under The All Writs Act "To Effectuate And Prevent The Frustration" Of Its Orders Barring *Agent Orange* Class Members From Filing Actions In State Courts

Petitioners argue (Ivy Pet. 23; Hartman Pet. 47) that, "at minimum, review should be granted * * * to clarify the boundary of lower courts' authority under the All Writs Act." There is no merit in that suggestion. The All Writs Act gives a federal court the power to issue "appropriate" writs "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone*, 434 U.S. at 172. That is precisely what the district court did here.

1. Jurisdiction was "otherwise obtained" in this case as ancillary to the district court's "continuing jurisdiction" over the Agent Orange *class action.*

It is well-settled that federal courts have ancillary jurisdiction to enforce their orders and judgments, including injunctive orders and decrees.[5] As noted above, the district court had "continuing

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[5] See, *e.g.*, *Finley v. United States*, 490 U.S. 545, 551 (1989) (ancillary jurisdiction may be asserted even over non-parties "when necessary to give effect to the court's judgment"); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986) (Congress amended Anti-Injunction Act to permit courts to issue injunctions to "protect or effectuate its judgments," codifying Justice Reed's

jurisdiction" over the *Agent Orange* class action and thus had ancillary jurisdiction to enforce its orders implementing the Settlement Agreement. Pet. App. A10, A49-51.

From the defendants' perspective, the most important consideration in agreeing to settle this action, despite their strong defenses, was the assurance that *Agent Orange* litigation by Vietnam veterans would be brought to an end. That assurance was guaranteed in two ways: the fact that the *Agent Orange* class included veterans with after-manifested symptoms, and the provisions of the Settlement Agreement and district court order that barred new actions brought by members of the class. In providing that "[t]he Settlement Agreement shall be consummated in accordance with its terms," the district court specifically ordered that every member of the class "is hereby forever barred from instituting or maintaining any action against any of the defendants * * * arising out of or relating to, or *in the future arising* out of or relating to, the subject matter of * * * this class action." 618 F. Supp. at 624-25 (emphasis added). The district court found that petitioners had violated this injunction, which was expressly directed against persons who might thereafter assert claims based on after-manifested injury ("in the future arising"). See Pet. App. A51, A52.

Thus, as both courts below held, the district court had jurisdiction to enforce its injunction against relitigation by class members, in addition to its general retained jurisdiction to enforce the Settlement Agreement and administer the settlement fund. Pet. App. A10, A21, A51-52. Petitioners, who concede that they are members of the plaintiff class subject to the anti-litigation provisions of the Settlement Agreement, do not take issue with any of these determinations, which are fatal to their legal position.

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dissenting views in *Toucey, infra*); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 146 (1941) (Reed, J., dissenting). The principle applies with undiminished force to injunctive orders. See, *e.g.*, *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452-55 (1932); *In re Debs*, 158 U.S. 564, 594 (1895).

2. *The district court exercised its power under the All Writs Act "to effectuate and prevent the frustration of" its orders.*

By bringing these actions, petitioners "challenge the binding effect of the Settlement Agreement and the order of [the district] court prohibiting new suits by class members." Pet. App. A55. Petitioners "seek to avoid" and "circumvent" the district court's orders and judgment. *Id.* at A49, A42. Petitioners' suits, if successful, "will automatically reduce the sums available for other class members." *Id.* at A42. Based on these findings, the district court determined that petitioners' suits constitute "a direct threat to the continuing viability of the judgment settling the class action." *Id.* at A55. The Second Circuit agreed that "the deleterious effect on the *Agent Orange I* settlement mechanism would be substantial" and concluded that the district court "was enforcing an explicit, ongoing order" and "guarding the integrity of its rulings." *Id.* at A8-A9.

Petitioners take issue with these fact findings, but their arguments are disingenuous. They assert that "[t]heir case manifestly was not * * * a 'challenge[ ]' to the settlement agreement"; rather, they simply "sought to pursue their own suit for money damages, entirely separate from the settlement" (Ivy Pet. 22; Hartman Pet. 41). Nowhere do petitioners acknowledge that, as members of the *Agent Orange* class, they were parties to and beneficiaries of the settlement, much less explain how their actions in bringing suit against defendants can be reconciled with the anti-litigation provisions of the Settlement Agreement. Petitioners also assert (Ivy Pet. 22-23; Hartman Pet. 42 n.35) that "[n]othing about [their] Texas lawsuit affects the operation of the [Settlement] Fund." But defendants entered into the settlement, and agreed to put $180 million into the settlement fund, on the express understanding that they would not be subject to any future litigation brought by members of the *Agent Orange* class. It is by no means clear how the courts would or could unscramble the eggs if that understanding is invalidated at this late date.

3. The district court's remedy was "appropriate" on the facts of this case.

Where, as here, there is federal jurisdiction and a need to protect the integrity of ongoing federal proceedings, this Court interprets the All Writs Act "flexibly" to determine whether the particular remedy employed is "appropriate" on the facts of the particular case. *New York Telephone*, 434 U.S. at 173. Congress specifically amended the All Writs Act in 1948 to confirm the power of the federal courts to issue "appropriate" writs as well as "necessary" writs. *Ibid.* The All Writs Act serves as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." *Ibid. at 172, quoting Harris v. Nelson*, 394 U.S. 286, 299 (1969) (internal quotation omitted). The court may issue such writs as are "calculated in its sound judgment to achieve the ends of justice entrusted to it." *Ibid., quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

Petitioners ask the Court to look to the analogy of statutes granting removal jurisdiction to determine whether removal is an appropriate remedy under the All Writs Act. Because Congress did not explicitly authorize removal jurisdiction to enforce and prevent the frustration of federal court orders, petitioners contend that federal courts are powerless to order removal as a remedy, even if removal is otherwise appropriate. Petitioners' contention runs flatly contrary to the Court's entire body of All Writs Act jurisprudence. While removal *jurisdiction* is determined in accordance with the removal statutes, the appropriateness of removal *as a remedy* where jurisdiction is "otherwise obtained" is determined under the Act. The whole point of the All Writs Act is to provide federal courts with remedies not otherwise specifically authorized by Congress. Congress plainly intended the All Writs Act to give the federal courts acting to enforce their orders broader powers than they would otherwise have, or there would have been no need for the Act.

This Court has repeatedly held that courts have power to enforce their orders and preserve their jurisdiction under the All Writs Act through means that Congress did not explicitly authorize. *New York Telephone, supra; Harris v. Nelson, supra; Federal*

Trade Comm. v. Dean Foods Co., 384 U.S. 597, 608-11 (1966); *Scripps-Howard Radio, Inc. v. Federal Communications Comm.*, 316 U.S. 4, 10-11 (1942). In *New York Telephone*, the Court approved a writ mandating telephone company assistance in the use of pen registers, despite the fact that Congress had authorized such assistance in other statutes governing electronic surveillance but had not done so in the statute governing pen registers. 434 U.S. at 176-78. In *Harris*, Congress had provided by statute for interrogatories in habeas corpus proceedings in some limited circumstances, but not in the circumstances before the Court. The Court nevertheless upheld the lower court's power to order interrogatories under the All Writs Act, as "necessary or appropriate in aid of [its jurisdiction] * * * and agreeable to the usages and principles of law. 28 U.S.C. § 1651." 394 U.S. at 300.

In approving a writ mandating assistance by non-parties in the use of pen registers, the Court in *New York Telephone* relied on a "clear indication by Congress that the pen register is a permissible law enforcement tool." 434 U.S. at 176-78. Similarly, by passing the Anti-Injunction Act, 28 U.S.C. § 2283, Congress has specifically approved the power of federal courts to enforce their orders and to prevent relitigation in state court proceedings of issues that have already been determined in federal court. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. at 524. The Second Circuit found that such power was available as an alternative in this case. Pet. App. A10. Under *New York Telephone*, the district court had the power to employ other "appropriate" remedies under the All Writs Act, including the remedy of removal employed in this case, whether or not Congress had specifically authorized such a remedy.[6]

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[6] Petitioners attempt to explain this Court's recent denial of review in *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989), by asserting that any error in ordering removal there was "purely a procedural one" and that "any reversal * * * would merely [have] delay[ed] the ultimate implementation of the district court's remedial orders." Ivy Pet. 24-25 n.32 (quoting *Yonkers* brief in opposition). Petitioners fail to realize that the very same argument could be made in opposition to their effort to obtain review of the removal issue in this case. If this Court were to conclude that the district court improperly accepted removal under the All Writs Act, the district

C. The District Court's Order Is Supported By Principles Of Federalism And Comity

The remedy employed by the district court was particularly "appropriate" when viewed in light of principles of federalism and comity. The courts below gave careful consideration to the need to prevent unnecessary friction between the state and federal courts and fashioned a remedy that sought to accommodate the competing interests.

The district court was faced with petitioners who had flagrantly violated its order barring the filing of new actions in state court and who threatened to prejudice the rights of other class members and defendants under a federal judgment. And, of course, if these petitioners could maintain their actions in Texas state courts, nothing would stop other veterans from bringing similar actions -- producing potentially inconsistent rulings on the preclusive effect of the federal action -- in each of the other 49 States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. The court concluded that it had the power under the Anti-Injunction Act to enjoin the Texas state court actions as necessary to prevent "rulings inconsistent with the prior federal order." Pet. App. A55. See *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993). In addition, it considered the possibility of enforcing its order through the contempt power, which also would have made a shambles of the Texas proceedings. *Ibid.* The court ultimately concluded that removal was "the preferred method of enforcement, since it *affords greater comity to state courts* and is less burdensome on the parties than an injunction or contempt citation would be." *Ibid.* (emphasis added).

The court of appeals agreed that the case was properly a matter for the federal rather than the state courts and that the district court had the power to enjoin the state proceedings under the Anti-Injunction Act. Pet. App. A10. As the court below stated in

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court on remand unquestionably could enjoin petitioners from proceeding against defendants in state court. Indeed, the court has held defendants' motion for an injunction in abeyance. Pet. App. A55-A56. Thus, the question that petitioners have presented to this Court will have no bearing on the ultimate outcome of this case.

response to petitioners' argument that the state courts were fully capable of deciding the res judicata effect of a federal judgment:

> The district court was not determining simply the preclusive effect of a prior final judgment on claims or issues expected to be raised in subsequent collateral proceedings; *it was enforcing an explicit, ongoing order against relitigation of matters it had already decided, and guarding the integrity of its rulings in [a] complex multidistrict litigation over which it had retained jurisdiction.*

Id. at A9 (emphasis added). The Second Circuit pointedly remarked that petitioners were advocating not comity, but abdication of the duty of the federal courts to enforce their orders. The court explained that such a result "is not the sort of federal/state comity envisioned" in this Court's precedents since it "would threaten the authority of the federal judicial system and potentially nullify the federal courts' orders and judgments." *Id.* at A11.

Petitioners -- who seek individual advantage at the expense of their fellow class members and who have been found in direct violation of a federal court order -- ask this Court to hold that the federal district court with continuing jurisdiction over the class action is powerless to do anything about it. And they make this astounding argument in the name of federalism and comity! This Court has held that federalism and comity required that a Texas state court judgment be challenged in the Texas state courts, not in the New York federal courts. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). On the facts of this case, neutral application of these principles required that petitioners challenge the orders and injunctions of the New York federal court in the New York federal court, not in Texas state court.

As members of the *Agent Orange* class, petitioners were bound by the Settlement Agreement and the district court's order barring the filing of this suit in state court. They were obligated to obey these orders until such time as the orders might be modified or vacated either by the district court or on appeal. This Court has repeatedly affirmed the "established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are

expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980).[7]

Had the district court relied on the contempt power to punish petitioners for violating its orders, petitioners' due process objections would not have been a defense. *Walker*, 388 U.S. at 318-21. Had the district court simply enjoined petitioners' state court suit, petitioners' due process objections would not have been heard by any court. Instead, the district court employed the All Writs Act to preserve its authority to enforce its orders and implement the Settlement Agreement, while minimizing any possibility of conflict with the Texas state courts and granting petitioners the opportunity they sought to challenge the court's orders without punishing them for having violated those orders. This accommodation of state and federal interests was surely "appropriate" under the All Writs Act.

Principles of federalism and comity do not require that a federal court stand helpless while its orders are ignored. Petitioners improperly challenged and indeed violated federal court orders. Their challenges belonged in the federal court responsible for enforcing those orders.[8]

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[7] See *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983); *Walker v. City of Birmingham*, 388 U.S. 307, 313-15 (1967). Petitioners were required to move the federal court that issued the order barring filing of state court suits for modification of that order instead of violating the order and seeking to prevent the federal court from enforcing it. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 440 (1976); *United States v. United Mineworkers of America*, 330 U.S. 258, 293-94 (1947).

[8] The brief filed by several states as *amici curiae* proceeds under a material misunderstanding of both the facts of this case and the Second Circuit's narrow decision. Thus, *amici* are simply wrong in their premise that "petitioners' case could [not] have been brought in a federal district court in the first instance." Am. Br. 1. In fact, petitioners' case *was* brought in federal district court, because petitioners were parties to the *Agent Orange* class action in the Eastern District of New York. See Pet. App. A54. Petitioners also could have filed a motion in federal court to be removed from the *Agent Orange* class for due process reasons. Moreover, petitioners violated an express anti-litigation provision of the federal judgment settling the *Agent Orange* case, and their actions threatened to jeopardize the entire *Agent Orange* settlement. *Amici* never mention these inconvenient

II. THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIMS AS BARRED BY THE *AGENT ORANGE* CLASS SETTLEMENT

Petitioners also contend, in summary fashion, that the district court erred in dismissing their claims as barred by the Settlement Agreement. See Ivy Pet. 25-30; Hartman Pet. 53-65. Petitioners do not dispute the district court's conclusion that they "are all members of the class barred from instituting new actions against the settling defendants." Pet. App. A51. Instead, they claim that it was improper to include them as part of the *Agent Orange* class. The courts below properly rejected that fact-bound argument on grounds that raise no issues suitable for review by this Court. In so doing, they carefully reviewed and reaffirmed the continuing "fundamental fairness" of the Settlement Agreement. Pet. App. A21; see also *id.* at A19-A21, A56-A59.

Only by disregarding the extensive and complex history of this litigation are petitioners able to assert (Ivy Pet. 28; Hartman Pet. 60) that this case would be an "excellent vehicle for any range of holdings" regarding the management of class actions. In fact, the *Agent Orange* class certification and settlement were approved by the district court and the court of appeals on the basis of unique facts and circumstances unlikely to occur again.

In 1984, when the defendants sought a writ of mandamus to overturn the certification of the *Agent Orange* class, the Second Circuit recognized, in rejecting the petition, that "this action is '*sui generis*, and national in its proportions' involving an extraordinary constellation of facts, parties and pleadings." 725 F.2d at 860 (quotation omitted). Moreover, in 1987, when the court of appeals affirmed the certification of the class and approved the settlement, it once again strongly expressed its skepticism that the class action device was appropriate in mass tort cases. 818 F.2d at 164-66.

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facts, much less explain why it is an "insult to state courts" (Am. Br. 1) for federal courts to enforce their orders and protect their judgments. In sum, the concerns of federalism and comity raised by *amici* are addressed to a hypothetical ruling allowing federal courts to order cases removed from state to federal court whenever they see fit. For reasons stated above, the actual facts of this case bear no resemblance to that hypothetical.

The Second Circuit was willing to allow a class action here only because of the "centrality of the military contractor defense" (*id.* at 166), which was (a) common to the cases of all plaintiffs, including those with "after-manifested injuries," (b) very strong, and (c) potentially dispositive of all of the claims. *Id.* at 167. Indeed, the court stated that "[w]ere this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error." *Id.* at 166.

Thus, the *Agent Orange* litigation involved a *sui generis* class action that the court of appeals expressly distinguished from the "typical" mass tort litigation. In such circumstances, it is difficult to imagine a more inappropriate "vehicle" for this Court's review of any aspect of class action procedure, much less the fact-specific questions petitioners present, because "review would be of no importance save to the litigants themselves." *Rudolph v. United States*, 370 U.S. 269, 270 (1962).

Review of this case to decide recurring class action questions also would be inappropriate because the settlement at issue occurred nearly ten years ago. In reliance on the Second Circuit's affirmance of the settlement order and this Court's denial of certiorari in 1988, some $164 million has been disbursed from the settlement fund to over 30,000 class members, including thousands who manifested injury *after* the May 7, 1984 settlement date. Special Master's Letter, *supra*. Petitioners do not even attempt to suggest how at this late date the clock could be turned back to 1984, in the event the class action settlement were to be set aside. Fortunately, however, petitioners' arguments in opposition to the settlement are no more compelling or worthy of review than they were when this Court denied certiorari in 1988.

A. The Settlement Agreement Does Not Discriminate Against Claimants With After-Manifested Injuries

Petitioners contend (Ivy Pet. 26; Hartman Pet. 55-56) that it raises concerns of "basic fairness" to combine plaintiffs with after-manifested injuries in a class with other plaintiffs, because there is an "unavoidable" conflict of interest between the two groups. But petitioners make no effort to explain how this supposed conflict of interest actually affected the Settlement Agreement. Nowhere do

they attempt to rebut the district court's statement that all of the courts that considered the settlement were fully cognizant of the hypothetical conflict and "took steps to minimize the problem in the way they arranged for long-term administration of the Settlement Fund." Pet. App. A57-A58.

The facts also belie petitioners' concerns. As noted above (see page 6, *supra*), more than half of all disability claims paid by the fund were for after-manifested injuries, and more than half of all survivor claims paid by the fund (including claims filed by two of the named petitioners) were for deaths occurring after May 7, 1984. All of these claimants had their claims reviewed, and in appropriate cases received compensation, on a non-discriminatory basis.

Petitioners' attempt to characterize the court of appeals' decision as one that will affect future class action procedure is equally insubstantial. To begin with, as the court below itself noted, this case was atypical and would not be a model even for future cases filed in the Second Circuit. Pet. App. A21. Moreover, in the decade following the *Agent Orange* settlement, other courts, including those noted by petitioners (Ivy Pet. 25 n.33; Hartman Pet. 54 n.43), have opted for the appointment of a trustee to represent the interests of class members who have not yet manifested injury. Thus, not only has the unique *Agent Orange* experience not been followed in subsequent class actions, but this Court will have ample opportunity to consider the issue in a context where its resolution is far more material to the outcome of the litigation.

B. The Inclusion In The *Agent Orange* Class Of Persons Who Had Not Yet Manifested Injury Satisfied The Standing Requirement Of Article III

Petitioners also contend, without elaboration, that under Article III of the Constitution it "may be illegitimate" to include in the *Agent Orange* class "persons who have manifested no perceptible injury" from their exposure to an allegedly harmful substance. Ivy Pet. 26-27; Hartman Pet. 56. Petitioners misunderstand both the application of the standing requirements of Article III to a class

action[9] and the nature of the "injury" necessary to satisfy those requirements.

There is, in fact, no question that a person exposed to a toxic substance, even if not yet manifesting injury and even if only "at risk," has standing under Article III to bring suit. Indeed, in *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73-74 (1978), this Court held that a group claiming future exposure to radiation from a power plant that had not yet been built satisfied the "injury in fact" standard for standing under Article III. Similarly, in *Helling v. McKinney*, 113 S. Ct. 2475 (1993), this Court held that a prisoner subjected to second-hand tobacco smoke, who had sustained no present injury, stated a valid claim under the Eighth Amendment. As a prerequisite to that holding, this Court must have determined that the prisoner had standing to assert such a claim. Thus, a party who has been exposed to a harmful substance has sustained an "injury in fact" and has not asserted a merely "hypothetical" or "abstract" claim.[10] The class in this case was properly defined to include members of the military who were "expos[ed]" to Agent Orange in Vietnam, regardless of when their symptoms first manifested themselves. See Pet. App. A12-A15

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[9] The concept of standing focuses on the party bringing suit. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). At the inception of a class action, the only party before the court is the *named plaintiff*. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Petitioners nowhere suggest that the named plaintiffs in the *Agent Orange* class action failed to allege actual injury or lacked standing to act as class representatives. Rather, petitioners focus solely on their own "standing" as absent class members. See Ivy Pet. 26-27; Hartman Pet. 56. Once threshold individual standing by the class representative is met, however, "a proper party to raise a particular issue is before the court, and *there remains no further separate class standing requirement in the constitutional sense.*" 1 Herbert B. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS § 2.05 at 2-28 (3d ed. 1993) (emphasis added).

[10] Petitioners' reliance (Ivy Pet. 27; Hartman Pet. 57 n.46) on the dissent in *Hoffman-La Roche Inc. v. Sterling*, 493 U.S. 165, 174 (1989), is puzzling. The dissenters in *Hoffman-La Roche* explicitly recognized that a court has power over the parties to a pending case, such as members of the *Agent Orange* class, and questioned only the extension of that power to members of the public at large who were not parties to the action. See *id.* at 177-78.

(holding that "at-risk" veterans suffered a "personal injury" under New York law).

C. The Notice Provided To Members Of The *Agent Orange* Class Comported With Due Process And Cannot Justify Overturning The Class Settlement

Petitioners contend (Ivy Pet. 28-29; Hartman Pet. 62-64) that they were denied their due process rights to adequate representation and notice when they were included in the plaintiff class. Petitioners' fact-bound contentions, however, have already been considered and rejected in two rounds of litigation before the district court and the court of appeals. Furthermore, on two previous occasions, this Court chose not to review any of the issues relating to the district court's certification of a class in the *Agent Orange* litigation. See 484 U.S. 1004 (1988); 465 U.S. 1067 (1984).

Petitioners complain that they did not personally receive notice of the class certification and settlement, or were not in a position to understand the notice if they did receive it. See Ivy Pet. 28; Hartman Pet. 60-62. But the concept of adequate notice does not require that each class member receive actual notice. Rather, notice to absent class members must be the "best *practicable* 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). In 1987, the court of appeals, in a decision this Court declined to review, considered and expressly rejected the notion that each class member had to receive actual notice, and further held that the absent class members *had* been given the best notice practicable under the circumstances. 818 F.2d at 167-69. The court below reaffirmed those conclusions in this case. Pet. App. A16-17.[11]

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[11] The Hartman petitioners also suggest (Pet. 43-47) that the removal of this case from state to federal court amounted to a denial of the right of collateral attack. However, the court of appeals denied only petitioners' claim that their choice of a Texas forum for their collateral attack was unchallengeable. Pet. App.

In *Battle v. Liberty National Life Insurance Co.*, 770 F. Supp. 1499 (N.D. Ala. 1991), aff'd, 974 F.2d 1279 (11th Cir. 1992), cert. denied, 113 S. Ct. 2999 (1993), a collateral attack in state court was stayed in favor of federal court adjudication to prevent interference with the administration of an ongoing class action settlement. The district court in *Battle* upheld the settlement, noting that because the interests of absent class members were the same as those who received actual notice, "the latter could adequately speak for [absent class members] vis-a-vis the named plaintiffs and class counsel." 770 F. Supp. at 1520. The court also stated, in a conclusion that is directly applicable to this case:

> In closing, the court observes that however substantively disadvantageous the settlement may have been to these movants, there are substantial equities which at this late date fall on the other side of the equation. This court correctly noted in its 1987 injunction order that a complex judgment, constructed after extensive litigation, materially affecting the rights of millions of individuals, and on which all parties have substantially relied for fourteen years, "should not lightly be torn down." Whatever the shortcomings of the notice provided to policyholders by the court in 1977, they are insufficient to justify relief under the constitutional wrecking ball of Rule 60(b)(4).

A11. Petitioners' collateral attack on due process grounds was fully presented and considered anew in the proceedings below. As in any collateral attack, the district court, upon determining that petitioners were properly members of the *Agent Orange* class, enforced the Settlement Agreement and dismissed the claims. Petitioners cannot claim that they were denied the right of collateral attack simply because that attack was unsuccessful. *In re Real Estate Title & Settlement Services Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), and *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, No. 92-1988 (Oct. 4, 1993), both involve special considerations applicable to no-opt-out class actions and are inapposite here. *See Carlough v. Amchem Products Inc.*, *supra* (explaining and distinguishing *In re Real Estate Title* in opt-out class action). Moreover, while the *Agent Orange* Settlement Agreement bars subsequent state court suits by class members, the class action settlement underlying *In re Real Estate Title* and *Brown* did not.

Id. at 1522 (citations omitted).

If a reconsideration of the ***Battle*** class action could be likened to a wrecking ball, any reconsideration of the ***Agent Orange*** class action would resemble an earthquake. This Court, were it to accept the arguments advanced by petitioners, could not simply hold that petitioners were improperly included as parties to the Settlement Agreement. Rather, it would be required to void the portion of the Settlement Agreement barring further litigation against the defendants by class members with "after-manifested" injuries, and with it the Agreement itself. Thus, petitioners effectively seek not merely to exclude themselves, belatedly and inequitably, from a settlement entered into nearly a decade ago, but to render that settlement a nullity for the defendants and for the many thousands of class members who have already received or will receive disbursements from the $240 million ***Agent Orange*** fund.

If petitioners were successful in their challenge, the parties, the district court and the court of appeals could in the years ahead look forward to the Herculean task of determining what to do as a result of the belated, retroactive destruction of the May 1984 settlement. Fortunately, however, petitioners' attempt to destroy the settlement is based on specious arguments that were fully considered and properly rejected many years ago.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 28, 1994

No. 93-860

JAN 27 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS, MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES C. PARRY,

Petitioners,

VS.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE STATES OF MISSOURI, NEVADA, OREGON, SOUTH CAROLINA, WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO

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No. 93-860

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS, MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES C. PARRY,

Petitioners,

VS.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE STATES OF MISSOURI, NEVADA, OREGON, SOUTH CAROLINA, WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO

STATEMENT OF INTEREST

The States of Missouri, South Carolina, Washington, Oregon, Nevada and the Commonwealth of Puerto Rico file this brief *amicus curiae* to request this Court to grant the petition for a writ of certiorari in the case of *Ivy et al. v. Diamond Shamrock et al.*, No. 93-860 in order to protect their sovereign rights to maintain an effective judicial system and to enforce their laws.

We, the aforementioned States and Commonwealth, adopt without reservation the arguments and conclusion of the State of Texas, forty four other States and the District of Columbia in their brief *amicus curiae* previously submitted to this Court, and add to them the following reasons.

SUMMARY OF THE ARGUMENT

Former United States Marine Corps Captain Donald Ivy died in 1988, the year after he was diagnosed with cancer. Upon Captain Ivy's death, his wife brought suit, based on Texas state law claims, in the District Court of Orange County, Texas. The suit alleged that exposure to Agent Orange during service in Vietnam caused Captain Ivy's death. The District Court of Orange County had the right and authority to decide whether Captain Ivy's suit was barred by the 1985 *In re Agent Orange* class action settlement in Brooklyn federal court, a settlement entered three years before Ivy's cancer was diagnosed.

ARGUMENT

The individual States have the unquestionable right to provide their citizens with legal recourse for state claims through access to state courts. Article III federal courts, deriving their authority solely from the Constitution and statute, are courts of limited jurisdiction. They have no power to divest state courts of their jurisdiction unless that power has been granted to them. The All Writs Act, 28 U.S.C. §1651(a), conferred no such power or authority on the district court in the Eastern District of New

York in this case because the district court lacked jurisdiction over the Texas plaintiffs in this case.

The decision of the Second Circuit has countenanced the exercise of apparently boundless federal judicial power where none exists as a means to reach an unconstitutional end, the end being the extinction of causes of action before they were known to exist or became justiciable. In so doing, the court permitted form to neutralize substantive rights.

The class action is merely a procedural device under the Federal Rules of Civil Procedure to adjudicate substantive claims. As a procedural form of action under the Federal Rules, it creates no substantive rights nor may it "abridge, enlarge, nor modify the substantial rights of any litigant," precisely what has occurred here. Rules Enabling Act of 1934, Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064; *see also Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

Although veterans yet-to-manifest-injury were neither parties to, nor separately represented in, the original *In re Agent Orange* litigation, the Second Circuit concluded that settlement of that case decided their rights.[1] The right to due process would be hollow indeed if the right of Vietnam veterans and their survivors to seek redress in state court could be bargained away by others before the veterans and the scientific community knew that they had some interest in the bargain then being struck.

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[1] The *In re Agent Orange* complaint identified as and limited the plaintiffs to those veterans exposed to Agent Orange who were "thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Pet. Br. 5. After opt-out date the settlement agreement purported to enlarge the class to include "those persons who have not yet manifested injury." *In re Agent Orange*, 597 F.Supp. 740, 865 (E.D.N.Y. 1984). Whether such persons were not bound by the terms of the settlement agreement because they were not parties to the action, was an issue which the District Court of Orange County should have decided. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *see also Shields v. Barrow*, 17 How. 130, 139 (1854); *Mallow v. Hinde*, 12 Wheat. 193, 198 (1827).

The Second Circuit decision affects equally the rights of the States and their citizens. The court below legitimized a virtually limitless federal power of judicial intervention as a means of preventing Vietnam veterans from exercising state protected rights in state court. The interest of the States in the exercise of their own judicial power is thus at stake.

The Second Circuit dismissal of unmatured state claims also interferes with the right of the States to exercise legislative power which is clearly theirs and which some already have exercised with respect to Agent Orange. State laws are interlaced with enactments which furnish Vietnam veterans and their families with specific assistance and remedies for exposure to and injury from Agent Orange, wholly apart from what the federal government may have done, and in addition to other state statutory and common law remedies. For example, some States have enacted special Agent Orange statutes of limitations which begin to run two[2] or three[3] years from the date of discovery of Agent Orange injury, or from the date that a veteran or his survivor has been informed by a physician or competent medical

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[2] The West Virginia statute requires commencement of an action for personal injury "caused by contact with or exposure to chemical defoliants or herbicides, including agent orange . . . within two years from the date of discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later." W.Va. Code §16-28-10 (1983). The New York statute provides for the commencement of such an action " . . within two years from discovery of such injury, or within two years from the date when through the exercise of due diligence the cause of such injury should have been discovered, whichever is later." N.Y. *Civil Practice Law and Rules* §214-b (McKinney's 1982).

[3] The Rhode Island statute provides: "Notwithstanding any provision of law to the contrary, an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the Armed Forces of the United States in Indo-China . . . may be commenced within three (3) years from the date of the discovery of such inquiry, or within three (3) years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later." R.I. GEN. LAWS §9-1-14.2 (1985).

authority that he (or she) ". . . has been injured. . ."[4] or that ". . . injuries or death may be related. . ."[5] to Agent Orange. Other States have enacted statutes giving the State attorney general, on behalf of Vietnam veterans, the right to bring a class action to secure release of information with respect to [exposure] to Agent Orange.[6] Some have established registries to assess the effects of Agent Orange[7] and to provide medical and medical referral services.[8] A number exclude payments received for Agent Orange injury, including that received from suits against Agent Orange "manufacturers or distributors,"[9] from income calculations for tax purposes, benefits entitlement and employment preferences[10].

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[4] The Ohio statute reads as follows: ". . . a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arise upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure . . .". OHIO REV. CODE ANN. §2305.10 (1982).

[5] The Delaware statute reads: "Notwithstanding any other provision of law to the contrary, the time limitation for an action to recover damages for wrongful death or for personal injuries suffered by a member of the armed forces of the United States . . . due to exposure to phenoxy herbicides, including but not limited to exposure to substances known as Agent Orange . . . shall not expire until two years has elapsed from the date said person has been told by a licensed physician . . . that his (or her) injuries or death may be related, in whole or in part, to exposure to phenoxy herbicides." DEL. CODE ANN. tit. 10 §8131 (1983).

[6] HAW. REV. STAT. §321-267 (1982); OKLA. STAT. tit. 72 §355 (1982); OR. REV. STAT. §408.335 (1991); MICH. COMP. LAWS §333.5725 (1987); TEX. CODE ANN. *Health & Safety* §83.007 (1989); W.VA. CODE §16-28-6 (1983).

[7] HAW. REV. STAT. 321-264 (1982); LA. 29:301, 303 (1986); MINN. STAT. §196.26 (1982); OKLA. STAT. tit. 72 §358 (1982); S.C. CODE ANN. §(1986); VA. CODE ANN. §2.1-740 (1988).

[8] GA. CODE ANN. §31-30-7 (1982); OKLA. STAT. tit. 72 §356 (1982).

[9] IOWA CODE ANN. §422.7(20).

[10] MICH. COMP. LAWS §35.1072 (1990); MO. REV. STAT. §208.012 (1990); N.J. REV. STAT. §44:8-128 (1986); N.Y. *Military Law* §235-a (McKinney's 1993).

This enumeration of state action in the field is not intended to be all inclusive. However, it does show state legislatures looking forward to the day when science might be able to establish a firm causal connection between Agent Orange and injury to veterans. With the report of the prestigious National Academy of Sciences linking Agent Orange to certain specific medical conditions, that day may be at hand and may lead to further State legislation unless foreclosed by the Second Circuit opinion.

On July 28, 1993, one month prior to the Second Circuit's final decision in this case (A63), the Institute of Medicine of the National Academy of Sciences ("NAS") issued its report, thereby concluding an exhaustive one-year study and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange, other herbicides and the contaminant dioxin used in the Vietnam conflict.[11] The NAS report found sufficient evidence of a positive association between Agent Orange and soft tissue sarcoma, non-Hodgkins lymphoma, Hodgkins disease, chloracne and pophyra cutanea tarda (a blistering condition of the skin). National Academy of Sciences Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam*, 572, 678, 682 (1993). The NAS report also found limited/suggestive evidence of a positive association between Agent Orange and respiratory cancers (lung, larynx, trachea), prostate cancer and multiple myeloma. *Id.* at 574.[12] The Second Circuit's conclusion that ". . . despite continuing research, the crucial issue of 'general causation' . . . remains unsettled (A20)," is clearly wrong in view of the NAS' scientific findings of causation in fact.

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[11] The report followed a Congressional directive in Public Law 102-4 signed on February 6, 1991 that the Secretary of Veterans Affairs request the NAS to undertake the study.

[12] The report, based only on existing research, was unable to determine the presence or absence of an positive association between exposure to herbicides and the following health outcomes: seven other types of cancer, spontaneous abortion, birth defects, childhood cancer in offspring and neo/natal death and stillbirths. *Id.* at 577, 591-634. The rights of offspring of veterans exposed to Agent Orange are apparently not at issue in the *Ivy* case.

Thus, the Second Circuit's decision clearly implicates, if not threatens, the right of the States to enact legislation in the interest of their citizen-Vietnam veterans. It effectively sanctions the routine use of the All Writs Act to enforce a private agreement among litigants to settle for "nuissance value"[11] the *In re Agent Orange* litigation against those veterans who were not parties to the agreement. The Second Circuit decision has preempted existing or future State legislative action on Agent Orange and divested state courts of their jurisdiction to adjudicate suits brought under those and other statutes or the common law. Despite its insistence to the contrary, the Second Circuit did issue "a jurisdictional blank check which district courts may use [under the All Writs Act] whenever they deem it advisable." (A9).

Ultimately, the balance to be struck in this case is between the right of a federal court to act beyond its authority to usurp the jurisdiction of a state court in order to preserve a settlement beyond its jurisdiction to enforce, and the right of state courts and legislatures to act within their authority in furtherance of the due process rights of their citizens. Our constitutional system of checks and balances makes no provision for the issuance of "blank checks" to the federal courts. Surely, principles of federalism require the balance to be struck in favor of the proper exercise of state judicial power, rather than the perversion of federal judicial power.

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[11] The Second Circuit characterized it as such. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 171 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

CONCLUSION

Fundamental principles of federalism warrant the granting of the Petition for a Writ of Certiorari requested by Mrs. Ivy.

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IN THE
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SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; ET AL.,
Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF AGENT ORANGE COORDINATING COUNCIL; THE AMERICAN LEGION; VETERANS OF FOREIGN WARS OF THE U.S.; DISABLED AMERICAN VETERANS; AMVETS; JEWISH WAR VETERANS OF THE USA; RETIRED ENLISTED ASSOC.; VIETNAM VETERANS OF AMERICA; MARINE CORPS LEAGUE; CATHOLIC WAR VETERANS, USA, INC.; AMERICAN EX-PRISONERS OF WAR; BLINDED VETERANS ASSOC.; MILITARY ORDER OF THE PURPLE HEART OF THE USA, INC.; ARMY AND NAVY UNION, USA; POLISH LEGION OF AMERICAN VETERANS, USA; PARALYZED VETERANS OF AMERICA; REGULAR VETERANS ASSOC. OF THE U.S.; ITALIAN AMERICAN WAR VETERANS OF THE USA; WOMEN'S ARMY CORPS VETERANS ASSOC.; AMERICAN WAR MOTHERS; LEGION OF VALOR OF THE USA, INC.; CONGRESSIONAL MEDAL OF HONOR SOCIETY; THE RETIRED OFFICERS ASSOC.; NATIONAL VIETNAM VETERANS COALITION; FLEET RESERVE ASSOC.; THE VETERANS OF THE VIETNAM WAR, INC.; NATIONAL ASSOC. OF MILITARY WIDOWS; NEW JERSEY AGENT ORANGE COMMISSION; OKLAHOMA AGENT ORANGE FOUNDATION; AGENT ORANGE DATA BASE; AND THE AGENT ORANGE VICTIMS AND WIDOWS SUPPORT NETWORK, IN SUPPORT OF CERTIORARI

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STATEMENT OF INTEREST

Amici are 31 veterans service organizations, collectively representing more than 8,000,000 members.[1] *Amici* join together in this case in unprecedented solidarity to urge this Court to grant *certiorari* in order to review and ultimately undo the serious violations of the constitutional rights of Vietnam War veterans and their families addressed by the second Question Presented in the Petition.

This unique coalition has been inspired by the unstinting leadership of Admiral Elmo R. Zumwalt, Jr. (USN Ret.), who has previously served as Special Assistant to the Secretary of Veteran Affairs and as Chief of Naval Operations during the Vietnam War. In his role as chairman of ***Amicus Agent Orange Coordinating Council*** Admiral Zumwalt has provided a forum for many veterans service organizations to coordinate their interests in representing Vietnam veterans affected by Agent Orange.

Twenty-one *Amici* have been chartered by Congress to represent the interests of veterans of the Armed Forces and their families: (1) ***The American Legion*** (36 U.S.C. § 41), with 3.1 million members; (2) the ***Veterans of Foreign Wars of the United States*** (§ 111), with 2.2 million members; (3) the ***Disabled American Veterans*** (§ 90), with 1.2 million disabled members and 180,000 auxiliary members; (4) ***AMVETS*** (§ 67), with 200,000 members; (5) the ***Jewish War Veterans of the U.S.A.*** (§ 2701), with 100,000 members; (6) the ***Retired Enlisted Association*** (§ 5101), with 80,000 members; (7) the ***Vietnam Veterans of America*** (§ 3801), with 42,000 members; (8) the ***Marine Corps League*** (§ 57), with 37,000 members; (9) the ***Catholic War Veterans, USA, Inc.*** (§ 2601), with 35,000 members; (10) the ***American Ex-Prisoners of War*** (§ 2101), with 33,000 members; (11) the ***Blinded Veterans Association*** (§ 851), with 27,000 members; (12) the ***Military Order of the Purple Heart of the U.S.A., Inc.*** (§ 821), with 17,000 members; (13) the ***Army and Navy Union, U.S.A.*** (§ 3901), with 16,000 members; (14) the ***Polish Legion of American Veterans, U.S.A.*** (§ 2501), with 16,000 members; (15) the ***Paralyzed Veterans of***

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[1] Counsel for all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

America (§ 1151), with 15,000 members; (16) the ***Regular Veterans Association of the United States*** (Pub. L. 74-844), with 15,000 members; (17) the ***Italian American War Veterans of the U.S.A.*** (36 U.S.C. § 1701), with 10,000 members; (18) the ***Women's Army Corps Veterans Association*** (§ 3101), with 5,000 members; (19) the ***American War Mothers*** (§ 91), with 1,500 members; (20) the ***Legion of Valor of the United States of America, Inc.*** (§ 631), with membership restricted to recipients of the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, or Air Force Cross; and (21) the ***Congressional Medal of Honor Society*** (§ 791), with membership restricted to recipients of the Congressional Medal of Honor.

Amici also include the following unchartered organizations: (1) ***The Retired Officers Association***, with 450,000 members; (2) the ***National Vietnam Veterans Coalition***, which is an umbrella organization composed of 75 organizations with an estimated total of 350,000 members; (3) the ***Fleet Reserve Association***, with 170,000 members; (4) ***The Veterans of the Vietnam War, Inc.***, with 10,000 members; (5) the ***National Association of Military Widows***, with 1,000 members; (6) the ***New Jersey Agent Orange Commission***; (7) the ***Oklahoma Agent Orange Foundation***; (8) the ***Agent Orange Data Base***; and (9) the ***Agent Orange Victims and Widows Support Network***.

The general purposes for which Congress has chartered many *Amici* include the following: "to uphold and defend the Constitution," 36 U.S.C. § 43, and promote "fidelity to its . . . laws," § 823(a); to "stimulate to the highest degree possible the interest of the entire Nation in the problems of veterans, their widows, and orphans," § 2603(c); to "assist disabled . . . veterans and other veterans in need of assistance and the dependents and survivors of such veterans," § 3803(6); "to foster love for the principles which they have supported by blood and valor," § 57(a); and to "encourage the doctrine of universal liberty, equal rights, and full justice to all," § 2703(5). In fulfilling these congressionally mandated obligations, chartered *Amici* are duty bound to protest the efforts of the courts below to give overreaching preclusive effect to the 1984 settlement of *In re "Agent Orange."* Far from providing "equal rights" to injured

Vietnam veterans, that settlement has systematically denied many Agent Orange-exposed Vietnam veterans, who manifested no injuries as of the date of the settlement, fundamental constitutionally derived rights which are routinely accorded to every other citizen of the United States injured by a defective product, including the right to receive notice, the right to opt-out, the right to have adequate legal representation, and ultimately the right to have grievances adjudged by a jury of one's peers. Far from providing "full justice," the cruel result of that settlement has been to restrict Vietnam veterans and their dependents to the receipt of nuisance value recoveries of approximately $3200 when they suffer total disability or when they die as a result of their exposure to products manufactured by respondents. Appendix to Petition ("A___"), A19, A39.

Amici do not idly request that this Court review and ultimately reverse this denial of access to justice effectuated by the courts below. Many *Amici*, especially The American Legion, have actively pursued scientific research or have assisted others in developing scientific information concerning the health effects on Vietnam veterans from their exposure to Agent Orange and dioxin. *Amici* have also petitioned Congress to authorize scientific studies regarding exposure to herbicides.[2] As the average 20-year latency period for certain causally related injuries, such as cancer, passes, these studies are now creating a body of evidence that leaves little doubt that Vietnam war veterans were injured by respondents' defective products in the process of serving our nation.

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[2] One result of these extensive efforts is that the Department of Veterans Affairs has recently acknowledged that certain debilitating illnesses were caused by exposure to herbicides in Vietnam. The district court in its decision applauds the federal government for making compensation available to veterans through the Department of Veterans Affairs pursuant to the Agent Orange Act of 1991, Public L. No. 102-4, 105 Stat. 11 (1991). A58-59. Although *Amici* also applaud this legislation, *Amici* point out that the American taxpayer is now paying for all of the expenses for the injuries caused by Agent Orange rather than respondents, who had greater responsibility for those injuries, but who have through this class action settlement so far managed to cap their expense.

Thus, *Amici*, especially those chartered by Congress, are compelled to request this Court to grant review in this case — particularly given the significance of the deprivation of due process rights when viewed from the perspective of the losses suffered by individual veterans and their families, such as Captain Donald Ivy and his widow, Shirley Ivy. The Second Circuit opined that the rights of individual veterans, including Captain and Mrs. Ivy, are outweighed by "society's interest in the efficient and fair resolution of large-scale litigation." A17. *Amici* believe that the quest for "efficient" claims administration can never provide sufficient justification for the wholesale abandonment of constitutionally protected rights. Moreover, the abridgment of rights here is not made in the context of typical, homogenized class action claims previously considered by this Court, involving the collection of relatively small sums of royalties, as in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), or disputes over fees charged by title insurers, as in *Ticor Title Insurance Co. v. Brown*, No. 92-1988 (pending). Rather, this case involves highly individualized claims which literally implicate matters of life and death.

SUMMARY OF THE ARGUMENT

Amici respectfully submit that this Court should grant the petition for *certiorari*. The decisions below illustrate the grave dangers in any process that permits attorneys to negotiate a settlement on behalf of already injured plaintiffs by trading away the rights of absent, uninjured future claimants. In this case, core due process requirements, including the receipt of adequate notice, the opportunity to opt out, and the right to have adequate legal representation, were abandoned — an abandonment which was justified by the courts below for the inappropriate reasons of "efficiency" and "finality." A17, A35.

I. Future claimants, including the petitioners, were not provided with constitutionally adequate notice nor were they provided with a reasonable opportunity to opt out of the *In Re "Agent Orange"* settlement. Although the scope of the *Agent Orange* class was expanded upon settlement (and *after* certification) to include claimants, like Captain Ivy, who had not yet manifested

injury, no additional notice was given to new members of the class. And though the courts below were likely correct in stating that the effectiveness of notice to uninjured, potential future claimants was problematic, A17 (because such persons may not have attended to whatever notice was provided and, even if they did, they would have been forced to speculate upon the possibility of becoming ill in the future), the courts below were plainly incorrect in concluding that the difficulty of delivering such notice excuses the failure to deliver any notice whatsoever or justifies a presumption of the waiver of constitutionally protected liberty and property interests. Waivers of constitutionally protected rights cannot be valid unless they are knowingly and intelligently made.

II. Future claimants, again including the petitioners, were unrepresented during the *Agent Orange* settlement process. No subclasses were created, nor was a guardian appointed to safeguard the interests of future claimants. The courts below justified this utter lack of representation for absent future plaintiffs by citing the "unique circumstances" of the case. A21. However, this justification fails to take into account the very real divergent interests of present and future claimants, including different concerns about statutes of limitations, disparate interests in obtaining immediate financial recovery, and different capacities to await further scientific and medical developments which could clarify issues of causation.

III. The reiteration of notice, opt-out, and adequate representation requirements by this Court in the class action setting will give important guidance to lower courts throughout the country as they struggle with the problem of balancing the perceived need to encourage class action settlements against the basic obligation to protect the constitutional rights of individual class members. *Amici* submit that the courts below did not hold true to the balance that must be accorded these competing interests. Instead, the courts approved an unwarranted denial of the rights of American veterans — as well as plaintiffs in a wide range of circumstances — and sanctioned an extraordinarily broad use of federal judicial power. There are accepted mechanisms by which federal courts can preserve the rights to due process and trial by jury without imposing an unreasonable burden on the settlement of mass tort cases. The route taken by the courts below is not among them.

ARGUMENT

Amici are well situated to advise this Court on the costs, both in legal and in human terms, posed by the Second Circuit's extraordinary disregard of due process rights. The decisions below create a threat to settled law, to constitutional values of due process, and to the welfare of thousands of severely ill veterans and their families. In this light, the questions which must be answered are whether, to what extent, and under what circumstances may named class action claimants and their attorneys extinguish or compromise the rights of "future" claimants, *i.e.*, persons whose injuries have not yet become manifest.

Indeed, the lower courts are divided over whether present claimants may ever extinguish in any manner the rights of future claimants. Contrary to the decision below, in *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520 (E.D. Tenn. 1992), the court held: "No settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole." 821 F. Supp. at 524. The court explained that it would only "approve release language that barred . . . any class member's personal injury claim arising prior to the date the class was closed." 821 F. Supp. at 524. The court thus refused, without limitation, to approve a settlement that barred class members' personal injury claims arising *after* the class was closed.[3] *Amici* agree with that court. Certainly, any settlement purporting to extinguish the rights of future claimants should be gravely suspect and carefully reviewed.

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[3] Federal courts in Texas and Arkansas have reached similar conclusions. *See Yandel v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (court denied certification of class under Fed.R.Civ.P. 23(b)(3) by employees of an asbestos plant, expressing concern that "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer, or other pulmonary disease. These persons would be bound by decision rendered in this litigation."); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (court held that present employees cannot represent future employees in discrimination suit: "To rule otherwise, . . . the court fears that the due process considerations which permeate the decision of whether or not to certify a class would be ignored.").

I. FUTURE CLAIMANTS HAD NO NOTICE THAT THEIR CLAIMS WERE BEING EXTINGUISHED

This Court has held that in class actions seeking money damages, notice to absent claimants is required not only by Rule 23(b)(3), but also by due process. *Shutts, supra.* Yet, in the *In re "Agent Orange"* litigation, notice was never given to future claimants, in violation of their rights of due process. The extent of this deprivation is elucidated when related to the particular circumstances of Captain and Mrs. Ivy.

Captain Ivy served in the U.S. Marine Corps and was exposed to Agent Orange during his tour of duty in Vietnam from 1967 to 1968. After he returned from Vietnam, however, his exposure to Agent Orange became a distant memory. Thus, when in 1978 other Vietnam war veterans and their families first began to bring state law tort actions against the present respondents seeking monetary relief for injuries they believed were due to their Agent Orange exposure, A3, Captain Ivy, uninjured at that point, had no reason to pay attention to these claims. For the same reason, he remained unaware that these multiple state-law tort actions were consolidated into a single action known as *In re "Agent Orange" Product Liability Litigation*. A3, A68.

Because Captain Ivy had filed no lawsuit, had consulted with no attorney, and had never contacted the Veterans Administration regarding his exposure to Agent Orange in Vietnam, he had no way of knowing that on December 16, 1983, the district court would certify a Rule 23(b)(3) class with opt-out rights. A3-A4. Nor was Captain Ivy himself subsequently notified of the existence of the class, which was specifically defined to include:

> "*[T]hose persons who were* in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were *injured* while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . ."

A34-A35; 100 F.R.D. 718, 729 (E.D.N.Y. 1983) (emphasis added). In 1983, Captain Ivy, of course, did not believe that he had been "injured" by Agent Orange — nor could he reasonably have had such a belief — for the simple reason that as of that time he had no injuries. *See* A68-A69 (Affidavit of Shirley Ivy).

Thus, Captain Ivy neither knew nor could he have known that the deadline for opting out of this Rule 23(b)(3) class was May 1, 1984; and he was completely unaware that six days later, on May 7, 1984, the named plaintiffs and their attorneys would settle these cases for what the Second Circuit has characterized as "nuisance value," 818 F.2d at 171. Most importantly, Captain Ivy was wholly unaware that the settling parties would, after class certification, unilaterally change the definition of the class, thereby substantially extending its breadth by agreement: "*The Class specifically includes persons* [including, apparently, Captain Ivy] *who have not yet manifested injury*." 597 F. Supp. 740, 865 (E.D.N.Y. 1984) (settlement agreement), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (emphasis added). Nor was he aware that despite this modification, which substantially broadened the scope of the class, the district court would fail to direct that a second notice be distributed to currently uninjured veterans who were now covered by this broadened class definition.

Of course, this was not an issue which concerned Captain Ivy in 1984. It only became a concern to him in 1987 when, in his forties, he was diagnosed with cancer. It was at this time, while investigating the cause of his own cancer, that he realized its connection to Agent Orange, and first learned of the existence of the earlier *Agent Orange* class action litigation. A69. It was only then, in the context of preparing a state law tort action, that Captain and Mrs. Ivy were informed that the case they had not yet brought had already been settled for "nuisance value" of approximately $3,200 -- settled, that is, without anyone ever contacting them and without their ever being allowed to contact an attorney or to have one appointed to represent their interests. A19, A39, A69.

Shockingly, the Second Circuit could only offer a rather ominous justification for this abrogation of the due process rights of Captain and Mrs. Ivy (at A17):

> "[S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. . . . [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In contrast to the Second Circuit's cavalier approach to due process rights, this Court has been unwilling to countenance such abridgements of the constitutional rights of individuals. This Court has previously held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In a class action for money damages, rights to receive notice and the subsequent ability to opt out of the class cannot be abridged: "[W]e hold that due process requires *at a minimum* that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts, supra*, at 812 (emphasis added).[4]

Finally, what is most astonishing and most disturbing is the Second Circuit's willingness to countenance this abridgement of due process rights on the notion that "[p]roviding individual notice and opt-out rights to persons who are unaware of an injury would do

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[4] Few activities are subject to more extensive record keeping than military service; if the rights of future claimants can be abolished in this context without individualized notice, then the implications of the Second Circuit's decision are unlimited. By contrast, in an early decision regarding Rule 23 requirements, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded. *Eisen* raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with millions of members and a class representative with only a $70 stake. Despite the relatively small size of the individual claims, this Court held that the class action could proceed only with individual notice to more than two million class members whose names and addresses could be identified with reasonable effort, holding that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." Significantly, the Court in *Eisen* stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." *Id.* at 176. *See also Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) ("*Eisen's* notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim *separately*' by opting out of the class." (emphasis in original)).

little good."[5] The Second Circuit may well have been correct: individuals with no present injuries are not in a position to make intelligent decisions regarding the waiver of their rights.[6] However, it is inexcusable that the Second Circuit should respond to this problem by authorizing a judicial presumption of the waiver of constitutional rights instead of increasing the vigilance with which those rights are protected. A judicially countenanced presumption of waiver is directly contrary to numerous decisions of this Court. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (the waiver of constitutional rights "must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences."); *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver").

II. FUTURE CLAIMANTS DID NOT RECEIVE ADEQUATE REPRESENTATION DURING THE SETTLEMENT PROCESS

Settlement classes, in any setting, present serious potential for abuse. *See, e.g.*, Manual for Complex Litigation, Second § 30.41,

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[5] Other courts have not been as willing as the Second Circuit to abridge the notice and opt out rights of absent future claimants. *See, e.g., Dante v. Dow Corning Corp.*, 143 F.R.D. 136 (S.D. Ohio 1992) (requiring individual notice by first-class mail to all potential future breast implant claimants); *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979) (refusing to bind women whose mothers had ingested the drug DES unless personal notice was sent to every member, regardless of whether they had manifested injuries) (order vacated on other grounds, *Payton v. Abbott Labs*, 100 F.R.D. 336 (D.Mass. 1983)); *In re UNR Indus.*, 29 B.R. 741, 747 (N.D. Ill. 1983) ("[I]t is inconceivable that any notice short of personal notice to every person whom the debtors would seek to bind — and this could include, theoretically, every person in this country — would be acceptable under the principles of due process.")

[6] As stated by leading scholars in the field of class actions: "For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time . . . is of no beneficial use." 1 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, § 1.23 (3rd. ed. 1992).

at 236 (1985) ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties — even those with the best of intentions — to regard the interests of the class members too lightly."). Indeed, all participants in class action settlement negotiations have extraordinary incentives to settle. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement may be an opportunity to clear court calendars of tens of thousands of cases. And, not least of all, from the perspective of class counsel, the economic rewards of settlement sooner rather than later can be extraordinarily enticing — regardless of the inchoate needs of absent class members or future claimants.

For these reasons, adequate representation of absent claimants has become one of the cornerstones of due process guarantees in class actions, requiring, among other things, that class representatives and their counsel are aligned identically with the interests of absent class members. As this Court emphasized in *Hansberry v. Lee*, 311 U.S. 32, 45 (1940):

> [S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

In the present instance, however, the class as originally certified was not defined to include those veterans who had not yet manifested injury, and, as such, by definition the counsel for the class as originally certified did not represent claimants whose interests were "the same" as those of Captain and Mrs. Ivy.[7]

Indeed, the district court and the Second Circuit acknowledged the dangers that could be posed in the absence of separate representation for potential future claimants like Captain Ivy. A58. As the Second Circuit noted, "'[m]any genuine conflicts of interest . . . [can exist] in a situation such as this'" when there is no represented sub-class to decide whether to extinguish the unaccrued

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[7] *See* Note, *Abuse in Plaintiff Class Action Settlements: The Need for A Guardian During Pretrial Settlement Negotiations*," 84 MICH. L. REV. 308 (1985).

future claims of absent plaintiffs who have not yet suffered injury. A17 (quoting the district court). Nevertheless, no class representative was ever designated for Captain or Mrs. Ivy or for any other absent future claimant, nor were the future claimants represented by a separate attorney, trustee, or guardian. 996 F.2d at 1437; A18, A21.

Recognizing that future claimants received no separate representation, both the district court and the Second Circuit excused this admitted failure to accord Captain Ivy his rights to counsel, holding that constitutional rights of due process may be extinguished when a court makes a *post hoc* determination that no harm was caused by the abrogation of the right. Thus, both courts dismissed the requirement of separate counsel with the assertion that harm from any conflict had "never materialized," because all veterans would become eligible for identical "nuisance value" payments from the Fund. (Neither the district court nor the Second Circuit mentioned the fact that pursuant to the terms of the settlement the vast majority of veterans, *i.e.* those with injuries causing less than total disability or death, would not be entitled to receive any recovery at all. A18.) However, the applicable test of a conflict of interest is not to judge it on a *post hoc* basis, but rather to examine whether at the time of settlement there was a potential for conflict between the present injury and the future injury classes.[8] Clearly, such potential for conflict did exist. Nevertheless, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary." A21.[9]

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[8] The Comment to the American Bar Association's Model Rule 1.7(b) on Ethics and Professional Responsibility states that "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Cited by *ABA Committee on Ethics and Professional Responsibility*, Formal Op. 93-371, at 6.

[9] Unlike here, in bankruptcy, as well as in limited fund class actions under Rule 23(b)(1), it is at times necessary to account for future claims in order to preserve a portion of insufficient assets to cover future liabilities that have not matured. Yet, even in the few cases in this setting that have recognized future claimants, in light of the inescapable conflicts that may arise, the courts have typically segregated future claimants from present claimants into separate sub-classes with separate counsel. *See In re Amatex Corp.*, 755

Notwithstanding the inherent deficiencies in the Second Circuit's willingness to abandon constitutionally required due process rights subject to its own *post hoc* determination, both the Second Circuit and the district court were in error when they stated that a conflict had "never materialized" because future claimants and current claimants were treated identically. First, they were not treated identically. Those claimants who had present injuries which the claimants subjectively believed were related to their exposure to Agent Orange had the ability to judge the merits of their claim and reasonably decide whether to opt out of the class. On the other hand, Captain Ivy, who had not yet manifested any injuries, received no notice of the class and, in any case, could not intelligently evaluate the prospects of litigating the case to redress his injuries, because his injuries had not yet manifested.[10]

In addition, benefits were conveyed to present claimants that were not equally conveyed to Captain Ivy. First, many present claimants benefitted from the fact that class actions toll statutes of limitations. Thus, those present claimants who had suffered injuries much earlier were able to take advantage of participation in the settlement and avert a possible defense by respondents on the basis of the lapse of applicable statutes of limitations. Captain Ivy, however, had no incentive to compromise his claim to gain any such benefits, because his Texas statute of limitations did not begin to run until the time his injury was diagnosed, and Mrs. Ivy's statute did not begin to run until her husband's death.

F.2d 1034, 1042-43 (3d Cir. 1985) ("[N]one of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesperson."); *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re Johns-Manville Corp.*, 36 B.R. 743, 749, 752 (Bankr. S.D.N.Y. 1984), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

[10] In 1984, Captain Ivy's claim was not even justiciable. In *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2139 (1992), this Court has established an "irreducible constitutional minimum of standing" which requires that "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 2136 (citation omitted). In the absence of unbounded clairvoyance, the risk of Captain Ivy's developing an Agent Orange related cancer at some indefinite time in the future was, by definition, a speculative or conjectural injury rather than a current or imminent "injury in fact" as necessitated by *Lujan*.

Second, presently injured claimants had a rational incentive to seek an immediate, albeit less adequate, settlement, because their illnesses caused financial pressures, including the present costs of treatment. These costs were clearly defined. By contrast, Captain Ivy did not experience the same financial pressures nor did he have, in 1984, any knowledge of the potential costs of his future treatment and disabilities.

Third, unlike Captain Ivy, presently injured claimants were obligated by claims accrual rules of various jurisdictions to file their actions in a timely fashion. These suits were filed at a time when evidence of medical causation was only in the nascent stages of development. The district court recognized that it was "of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be revealed."[11] 597 F. Supp. at 795. This acknowledgement came in part because of the fact that when the *Agent Orange* cases were initially filed in 1978, at maximum claimants were only sixteen years post-exposure and at minimum six years. By contrast, mean cancer latency for environmental toxins is often in excess of twenty years. *See* Affidavit of Dr. Jenkins, 2d Cir. Appendix, No. 92-7575, at 133-34. And, as the district court noted, "[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan." 597 F. Supp. at 795. For these reasons, if independent counsel had been appointed for Captain Ivy, that counsel could have asserted that it would be unreasonable for Captain Ivy to accept a "nuisance value" settlement

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[11] The District Court went on to find that for the purpose of the opt-out claims before it, "[i]t appears unlikely that such proof will develop in time to affect th[at] litigation." 597 F. Supp. at 795. The district court then dismissed the claims of those persons who had exercised their opt-out rights. 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The grounds for dismissal were that the then-available scientific evidence was insufficient to demonstrate a causal link between Agent Orange exposure and plaintiffs' illnesses, and that the "government contractor defense" preempted state tort law. Only the latter ground was upheld on appeal, as the Second Circuit concluded that the district court's ruling was inconsistent with the law applied in the Second Circuit on the admissibility of expert testimony under the Federal Rules of Evidence, Rule 703. 818 F.2d at 189. This would remain true today under this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2797-98 (1993).

when his ability to substantiate medical causation (if he became ill from Agent Orange) would very likely improve with time.

In fact, despite the Second Circuit's protestations to the contrary, which are based upon material *dehors* the record,[12] scientific knowledge, obtained since the date of the settlement, has, as expected, strengthened claims that respondents' products were responsible for the occurrence of cancer in American war veterans. *See, e.g.*, Affidavit of Dr. Jenkins, 2d Cir. Appendix, No. 92-7575, at 129. Indeed, in 1991 Congress directed the Secretary of Veterans Affairs under Public Law 102-4 to "conduct a comprehensive review and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange." Pursuant to that charge, the National Academy of Sciences' Institute of Medicine Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides reported in August 1993 that there was sufficient evidence to conclude that there is a positive association between herbicide exposure in Vietnam and three classes of cancer (soft tissue sarcoma, Non-Hodgkin's lymphoma, and Hodgkin's disease) and that there was suggestive evidence of an association with three other classes of cancers (respiratory cancers, prostate cancer, and multiple myeloma). National Academy of Sciences Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (1993) (Attachment to July 28, 1993 letter of Robert Hager to Clerk of the United States Court of Appeals for the Second Circuit).[13]

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[12] A20. While not mentioning petitioners' substantial record evidence, the Second Circuit went outside the record and cited both Han K. Kang, *et al.*, *Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls* (1990) and 13B Arthur L. Frank, *Courtroom Medicine: Cancer*, § 25A.00, at 25A-4 (1992), quoting from Frank as follows: "'[F]urthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported.'" A20. However, the danger of such an *ex parte* evidentiary process is that a court risks the possibility of basing its decision on inaccurate information. Petitioners cited below, Brief for Shirley Ivy at 47, a case (tried by counsel of record for *Amici*) wherein the family of a worker exposed to dioxin received a $1.5 million verdict for his death due to soft tissue sarcoma. *Overmann v. Syntex (USA), Inc.*, No. 852-02681 (Div. 5), Circuit Court, City of St. Louis (Mo. July 10, 1991).

[13] To date, the Department of Veterans Affairs has announced regulations to compensate herbicide-exposed Vietnam War veterans for each of the above cancers, with the exception of prostate cancer.

Lastly, the district court itself recognized that "[f]uture claimants might . . . disagree with prior litigation strategy or find new evidence in support of their claims." A57. As it has turned out, one of the most difficult impediments to recovery for Vietnam war veterans in 1984 was the district court's perception of the expansive nature of the immunity given to defense contractors. Recently, the Second Circuit, by Chief Judge Oakes, has held that the district court's rulings herein regarding this defense did not survive this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which established a far narrower contractor defense than that applied by the district court. *See Joint Eastern and Southern District of New York Asbestos Litigation*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990).[14]

III. PURPORTED JUDICIAL EFFICIENCY CAN NEVER JUSTIFY THE WHOLESALE DENIAL OF DUE PROCESS RIGHTS TO FUTURE CLAIMANTS, ESPECIALLY WHEN THERE ARE ALTERNATIVE MEANS OF ENCOURAGING SETTLEMENTS

In addition to countenancing the abolition of due process rights for future claimants, the decisions below presage a remarkable expansion of federal judicial power. The district court's justification for upholding the parties' contractual agreement to extinguish the rights of Captain Ivy was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." A35. Concerned "that class action settlements simply will not occur" if they are made "too difficult" by according future claimants due process rights, the district court held that Captain Ivy's potential future claims in 1984 were outweighed by the "interests of presently injured plaintiffs as well as defendants in achieving a settlement." A58. The Second Circuit concurred that the deprivation of Captain Ivy's constitutional rights was justified by

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[14] *Boyle*, as applied to the facts here, would require that a jury, and not a judge, decide the issue of whether the government ordered its herbicide to be contaminated with deadly dioxin (which the government clearly did not do), and also decide whether the other elements of the defense were satisfied. *See Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d at 635 n.8; *Boyle*, 487 U.S. at 512, 514.

"society's interest in the efficient and fair resolution of large-scale litigation." A17.

However, fundamental constitutional principles can never be disregarded, especially for the sake of supposed efficiency. As this Court has stated:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken. . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).[15]

The Second Circuit's decision defies the history and very purposes of the Seventh and Fourteenth Amendments. The right to jury trial, as an essential civil right, was intended to safeguard against the type of supervisory dominion by the judiciary that the Second Circuit now advocates.[16] As the Chief Justice has stated:

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[15] *See also In re: General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979), wherein the Seventh Circuit disagrees with the Second Circuit's decision herein, stating that "convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class."

[16] *See, e.g.*, Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 832-35 (1980).

> The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence. . . . The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338, 343 (1979) (Rehnquist, J., dissenting).

Additionally, the Second Circuit has disregarded the very significant state interest in preserving the right of persons, like Captain and Mrs. Ivy, to bring suit subsequent to the manifestation of injury or the occurrence of death. Pursuant to the "discovery rule," virtually every jurisdiction in the United States has authorized a tolling of the statute of limitations until an injured person knows or should know of his or her injury.[17] As stated in Judge Frank's oft-quoted dissent:

> Except in a topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff.

Dincher v. Marlin Fire Arms Co., 198 F.2d 821, 823 (2d Cir. 1952). Yet, while virtually every jurisdiction has by now heeded these words, the Second Circuit would seem to add the paradoxical exception that an individual's claim can be settled *by others* before his or her cause of action exists.

It is clear then that the lower courts' preference for "efficiency" and "finality" cannot possibly justify their denial of the

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[17] *Urie v. Thompson*, 337 U.S. 163 (1949). *See also Barnes v. A.H. Robbins Co., Inc.* 476 N.E. 2d 84 (Ind. 1985) (collecting decisions) and 3 Louis R. Frumer and Melvin I. Friedman, *Products Liability* § 26.04 (1992) (collecting decisions applying discovery rule).

constitutional rights of future claimants. Even the presumption of the courts below that "class action settlements will simply not occur," A58, unless the rights of future claimants are ignored, is wrong. For instance, in the case of *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 166 (S.D. Ohio 1992), *appeal pending*, No. 923973 (6th Cir.), a district judge, faced with a desire of the respective parties to extinguish future rights, approved a settlement that compromised the rights of unknown future claimants in a class action involving convex/concave heart valves *only* on the condition that any class member who ultimately did suffer a fractured heart valve would be permitted *at that time* to opt out of the class, to arbitrate, or to accept payment under the terms of the settlement. There is no reason that a similar settlement could not have been approved by the courts herein.[18]

In the *In re Agent Orange* litigation, the thrust of the settlement could still have been preserved by ruling that notice was effective only as to those persons who had manifested Agent Orange-related injuries at the time of the settlement. On the other hand, those, like Captain and Mrs. Ivy, who subsequently manifested their injuries should have been given an opportunity to be informed of their right to pursue their cause of action in a civil jury trial and should have been afforded a reasonable period of time in which to exercise that right after the manifestation of their injuries.

Settlements, even for future claimants with *future opt out rights*, when predicated upon realistic evaluations of the prospective

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[18] Indeed, respondents are seeking a result by way of settlement that they could not have achieved through trial. Due process does not permit a class action judgment to bind absent class members with respect to particularized damage issues. Personalized damage and causation issues require individual trials. *See In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (reversing trial court's decision to adjudicate individual damages claims through statistical extrapolation from representative plaintiffs). *See, e.g.*, 3 Herbert B. Newberg and Alba Conte Newberg, *supra* note 6, § 17.39 ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for this mass tort has been permitted to be maintained and adjudicated as a class action. Those future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples.")

success of claims, will likely be favored by claimants in that they avoid significant transaction costs for both sides. However, when such settlements are unreasonable, it will then be more likely that future claimants will opt out and return to the civil justice system. Applied to the *Agent Orange* settlement herein, if future claimants truly face the dim prospect of success that is envisioned by the Second Circuit (A21) and respondents, then respondents need not fear that many veterans will opt for a return to the civil justice system. Nevertheless, fundamental constitutional rights are no less precious to veterans of our Armed Forces than they are to every other American, and it would be a travesty of justice if Vietnam veterans were not given at least the opportunity for a jury trial that is generally accorded to all other victims by our system of laws.

CONCLUSION

The courts below, in the putative interest of judicial efficiency and contrary to the dictates of due process, have fashioned a broad and far-reaching doctrine which caused Captain Ivy to be bound to the 1984 settlement and to have his rights extinguished without notice, without an opportunity to opt out, and without adequate representation. This purported solution was fashioned as if Congress had delegated to these two courts a broad power to create public policy concerning the compensation for all Vietnam veterans to the exclusion of every other state and federal court in the country. *Amici* do not believe that the courts below were vested with such plenary power and, therefore, *Amici* request that this Court grant *certiorari* in order to review and ultimately reverse this usurpation of legislative and judicial powers by the courts below.

Respectfully submitted,

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January 27, 1994

Supreme Court, U.S.
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No. 93-860

IN THE
Supreme Court of the United States
October Term, 1993

SHIRLEY IVY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DONALD IVY, DECEASED; CHARLES JARDON AND TONY K. JARDON, INDIVIDUALLY AND AS NEXT FRIEND OF CHARLES JARDON, JR.; ROBIN JARDON, WARREN JARDON AND SHARON JARDON; SHIRLEY ZALEWASKI, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF YEN ZALEWASKI, DECEASED; GARY THOMAS; MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BOBBY JOE INMAN, DECEASED; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JAMES D. PARRY, SR., DECEASED; JAMES D. PARRY, JR.; JAMES CHRISTOPHER PARRY,

Petitioners,

v.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY TO BRIEF IN OPPOSITION

The Petition for Writ of Certiorari demonstrated that the Second Circuit's decision below poses a serious threat to basic principles of federalism and due process. In particular, petitioners explained how the Second Circuit's novel doctrine, designed to allow the removal of "otherwise unremovable" cases, employs the All Writs Act as an eighth head of *subject-matter removal jurisdiction over newly filed cases*, on top of the seven specific removal provisions enacted by Congress. *See* Pet. at 9, 14-15, 23-24. In light of this expansive construction of the All Writs Act, which had somehow escaped the attention of courts and scholars alike for nearly two centuries until the Second Circuit uncovered it in 1988, petitioners posed the question of "[w]hether federal district judges may circumvent the limitations Congress wrote into its seven removal statutes" by using the All Writs Act in this broad manner. Pet. at i.

Respondents argue that petitioners' framing of the case "vastly distort[s] and overstate[s] what the court of appeals actually held." Brief in Opposition ("Opp.") at 9. Implementing this theme, respondents present two central arguments against review of the first Question Presented. The first is a make-weight attempt to distract this Court and to impugn the integrity and competence of the attorneys general of all 50 States, who have appeared as *amici* urging that certiorari be granted. Respondents' second argument is an elaborate effort to narrowly cast, and thereby hopefully rehabilitate, the Second Circuit's judgment, and thus compress the question presented. Here, respondents claim that the district court could have enjoined continued litigation of this Texas case, so that to accept removal was a proper alternative "remedy" under the All Writs Act. Ironically, if respondents' rehabilitation of the decision below were accepted, the actual result would be to strengthen the argument for certiorari by thrusting forward additional facets of the case worthy of this Court's review.

1. In their initial, make-weight argument, respondents repeatedly assert that in the process of approving the 1984 settlement the district court in *In re Agent Orange* issued an order enjoining petitioners from filing any state-court action relating to Agent Orange. They state that *petitioners could have been held in contempt* for filing their Texas lawsuit. *See, e.g.*, Opp. at i, 10, 21. Respondents do so, in part, to intimate that petitioners' overall legal position is academic and that petitioners should not be heard

to complain about the niceties of removal jurisdiction. Primarily, however, respondents level this charge in an attempt to explain away the noteworthy, unanimous appearance by all 50 States supporting petitioners' analysis of the decision below and urging the need for immediate review of the Second Circuit's All Writs removal doctrine.[1] Respondents denigrate the filings of these "several states," Opp. at 23 n.8, postulating that the attorneys general of all 50 States are laboring "under a material misunderstanding of both the facts of this case and the Second Circuit's narrow decision." *Id.*

The claim that petitioners could be held in contempt for an injunction issued in 1985 is ludicrous. Tellingly, respondents offer no supporting citations. To be sure, in its 1992 decision below the district court did opine that although its 1985 judgment entering the settlement was "not *labeled* an injunction" against future litigation, "the court *effectively* issued an injunction which bars the current actions." **A52** (emphasis added).[2] However, respondents fail to disclose that an *amicus* brief filed by 21 States in the Second Circuit (see Appendix hereto) meticulously demonstrated that the 1985 judgment could not possibly constitute an "injunction" under which petitioners could now be threatened with contempt, and showed that the district court's indulgence in *post hoc* revisionism is barred under this Court's precedents. Significantly, the Second Circuit carefully avoided grounding its decision on this "effective injunction" hypothesis, presumably because of the powerful arguments countering it presented by the 21 States. Respondents' insinuation that the state attorneys general know almost nothing

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[1] *See* Brief *Amici Curiae* of the State of Texas, *et al.*, in Support of Certiorari at 1 ("We agree with petitioners that [the Second Circuit's] decision, which reflects a clear conflict between the circuits, embraces a drastic and disturbing removal doctrine, one that authorizes a federal court to disregard the seven specific removal provisions enacted by Congress and to remove a case from a state court whenever it suits the perceived needs of the federal court."); Brief *Amici Curiae* of the State of Missouri, *et al.*, at 2 ("We . . . adopt without reservation the arguments . . . [of Texas' brief]. * * * Article III federal courts . . . have no power to divest state courts of their jurisdiction unless that power has been granted to them.").

[2] This statement disproves respondents' assertion that petitioners could be held in contempt for violating the express, unambiguous terms of an injunction. Respondents' brief fails to apprise the Court of this key passage.

about this case, even though they have appeared as *amici* since the district court stage and even though they specifically rebutted the "effective injunction" theory relied on by respondents, is as ridiculous as it is insulting.

2. Respondents focus most of their energy on an attempt to recast and thereby rehabilitate the decision below, which they portray as a modest and sensible decision, one limited to the unique facts of this case. They argue that "the district court had 'continuing jurisdiction' over the *Agent Orange* class action" given its supervision of the settlement Fund, and thus possessed plenary and perpetual power under the All Writs Act to issue necessary or appropriate orders to "enforce" the 1984 class action settlement. Opp. at 16-17. Respondents further urge that "the whole point of the All Writs Act is to provide federal courts with remedies not otherwise specifically authorized by Congress" so that "removal *as a remedy*" is an available option. Opp. at 19 (emphasis added).

Claiming that the district court in this case "had the power under the Anti-Injunction Act to enjoin the Texas state court actions as necessary to prevent 'rulings inconsistent with the prior federal order,'" Opp. at 21 (quoting **A55**), respondents argue that the "removal as a remedy" employed below is "'the preferred method of enforcement, since it *affords greater comity to state courts* and is less burdensome on the parties than an injunction or contempt citation would be.'" Opp. at 21 (quoting **A55**) (emphasis in Opp.). Thus, the question that respondents wish to put at issue is whether petitioners' Texas state court lawsuit "could be enjoined by the federal court to protect the integrity of the federal judgment and the settlement fund being administered by the court," clearing the way for removal as a less burdensome remedy. Opp. at i.

Respondents' strategy provides no basis for denying certiorari. **First**, respondents' attempts at recasting the decision below based on the facts of this case fall flat. Rather than adopting this "remedy" analysis, the decision below forthrightly characterized the All Writs removal doctrine as "an exception to the 'well-pleaded complaint' rule." **A7**. Indeed, the Second Circuit has made clear from the beginning that its All Writs removal doctrine operates as an eighth head of subject-matter removal jurisdiction. In *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (2d Cir. 1988), *cert.*

denied, 489 U.S. 1077 (1989), the district court's reason for removing the case was that a state court might interfere with civil rights remedies by deciding a state court eminent domain proceeding incorrectly. The Second Circuit expressed "serious doubts . . . whether the removal statutes provided a proper basis" for removal. *Id.* at 863. But the court rejected the idea that "the federal removal statutes are the exclusive sources of removal jurisdiction," and approved the district court's finding of "an independent basis for removal jurisdiction under the All Writs Act." *Id.* The stinging dissent in *Yonkers* certainly recognized the Second Circuit's doctrine as a new, judge-made removal provision. It noted that under the provisions enacted by Congress, removal was "manifestly not warranted" on the record of the case, and condemned the majority analysis as "a novel and unwarranted application of the All Writs Act which is abusive of . . . the most elementary principles of the comity that should exist between federal and state courts." *Id.* at 874, 876 (Mahoney, J., dissenting).[3]

Fairly viewed in terms of how the Second Circuit has proceeded, the broad issue necessarily posed by this case is whether it is sensible to speak (as respondents do) of removal as constituting a "remedy" under the All Writs Act — whether a federal district court possessing subject-matter jurisdiction in *one* case can assert subject-matter jurisdiction over a *new*, "otherwise unremovable" state court case simply by invoking the All Writs Act where a court deems it "appropriate" to do so. *See* Opp. at 18-20. As the 50 States have framed the point:

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[3] *See also United States v. City of New York*, 972 F.2d 464, 469 (2d Cir. 1992) (upholding All Writs removal on the fear that if the state court were allowed to decide a challenge to certain sewage disposal contracts, compliance with a federal consent decree might be hindered). The very different factual backgrounds of *Yonkers*, *City of New York* and this case reveal that there is nothing about the Second Circuit's holding in this case that is peculiar to the preclusive effect of class actions or to the Agent Orange litigation specifically. Rather, the All Writs removal doctrine appears to permit a federal district court, in any civil case, in its discretion to lift an "otherwise unremovable" case out of state court, as long as the district court has a past or present case that seems complex and/or important, and so long as it seems that the state court might do something inconsistent with earlier federal court actions, either because it is presumed that the case is too hard for the state court or because the state court otherwise cannot be trusted with the case.

> We fully agree with petitioners that [the All Writs Act] has nothing to do with conferring removal jurisdiction or any other kind of jurisdiction over a case. *See* Petition at 16-17. The All Writs Act only specifies certain powers of federal courts *once they are properly exercising jurisdiction over a case*. *Id.*

Brief *Amici Curiae* of the State of Texas, *et al.*, at 9.

The lower federal courts should not be permitted to "mix and match" the two separate statutory schemes governing removal *jurisdiction* (specified in 28 U.S.C. §§ 1441(a) & (d), 1442, 1442a, 1443, 1444 and 1452) and the *remedies* that might issue in a given case (governed by 28 U.S.C. § 1651(a) and other statutes). To permit this type of jurisprudential cross-dressing violates the axiom that Congress has ultimate control over the jurisdiction and remedial powers of federal courts, and that these courts may not rewrite the congressionally created scheme even if they believe it good policy to do so. *See* Pet. at 12-13 n.15, 15 n.23, 16-19.[4]

The Second Circuit's hybrid doctrine has been followed by at least two district courts outside the Second Circuit (*see* Pet. at 11 n.13) and, if respondents are correct, by the Ninth Circuit as well (*see* Opp. at 15). The logic behind the doctrine has been rejected by courts in three other circuits (*see* Pet. at 11 n.14),[5] and by this Court in decisions ignored by respondents (*see* Pet. at 17 & n.26).

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[4] Respondents' argument illustrates the perils of such a mix-and-match approach. Respondents confound *personal* jurisdiction and *subject-matter* jurisdiction when they claim that "the courts below did not employ the All Writs Act as [a] basis for federal [subject-matter] jurisdiction" over Ivy because such jurisdiction "already existed with respect to these petitioners by virtue of their membership in the class." Opp. at 11. Federal subject-matter jurisdiction pertains solely to a *case or controversy*; Congress has created no species of subject-matter jurisdiction over private *persons*. Respondents' conflation of personal and subject-matter jurisdiction makes the "removal as a remedy" theory a jurisdictional chimera.

[5] The conflict is real; nothing in the cited decisions of the Fifth and Tenth Circuits, and the Fourth Circuit district court, suggests that they would adopt the Second Circuit's free-floating approach to judicial power under the All Writs Act. Nor is it "highly revealing that petitioners relegate to a footnote" their citation of these cases. Opp. at 14. The placement of material in a footnote is hardly a sign that it is unimportant. *See, e.g., United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988).

At least in the class action context, as long as *any* circuit uses this doctrine, there will be "an enormous magnetic pull" toward forum-shopping, causing class actions to be filed in that circuit. *See* Brief *Amici Curiae* of the State of Texas, *et al.*, at 13. Prompt review to defend the integrity of Congress's choices is therefore imperative.

Second, in any event, there is nothing to respondents' assertion that the district court on this record could have simply enjoined petitioners from continuing their lawsuit in Texas. Respondents state that "[t]he Second Circuit found that such power was available as an alternative in this case." Opp. at 20 (citing **A10**). If the Second Circuit had made such a finding, that would only widen the importance of the first Question Presented. In fairness, however, the Second Circuit did not actually *hold* that an injunction could have issued against petitioners in this case, nor did the district court.[6] For three reasons, an injunction would have been improper:

(a) Lack of minimum contacts. Before the district court could entertain a motion to enjoin petitioners from litigating in Texas, it would have to establish the existence of minimum contacts sufficient to convey personal jurisdiction.[7] It is difficult to see how this could be done on this record. *See* **A70-71** (Aff. of Shirley Ivy).

(b) The Anti-Injunction Act. Most basic of all, the Anti-Injunction Act, 28 U.S.C. § 2283, in force since 1793, provides

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[6] The Second Circuit explicitly stated that it was "[a]ssuming *without deciding* that removal of a case is sufficiently akin to an injunction to come within the [Anti-Injunction] Act's ambit," and indicated (in dictum) only its view that exceptions to *the Anti-Injunction Act* might well exist on the facts of this case. **A10** (emphasis added). Respondents' bare assertion that the district court "unquestionably could enjoin petitioners from proceeding against defendants in state court," Opp. at 21 n.6, shows a confidence not shared by the district court below. In an otherwise exhaustive opinion addressing all of respondents' arguments, the district court failed even to address the motion for an injunction, *see* **A56**, suggesting that the matter is not as easy as respondents pretend.

[7] *See In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 764 n.1, 769-70 (3d Cir. 1989) (holding that a litigant can "properly raise its due process claim on collateral attack"; the "minimum contacts requirement" does not "wreak havoc on the class action system" because since *Hansberry v. Lee* "collateral attacks have been considered to be a necessary part of the class action scheme," and defendants may not "funnel all of these challenges into the class action court by bringing injunction actions").

that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Act is a linchpin of federal-state relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). In this case, as in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), the last, "relitigation" exception to the Act "is the only one even arguably applicable here." *Id.* at 146-47.[8]

It has long been clear that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court," based on "the precise state of the record and what the federal order *actually* said," not "what the order was *intended* to say." *Id.* at 148. Obviously, petitioners did not litigate their present tort claims in 1984; those claims did not even *exist* until later. *See* Pet. at 8. n.10. Nor have petitioners (or anyone else) ever before litigated in another court the detailed due process objections contained in the Petition (at 25-30); and no analysis of these arguments appears in any *Agent Orange* decision prior to the decisions in this case. Respondents' repeated assertion that the precise scope of persons bound by the 1984 settlement was litigated and decided at that time is preposterous, as is their claim that petitioners have somehow conceded that they are members of the class.[9]

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[8] The "in aid of jurisdiction" exception permits injunctions only while the district court is exercising jurisdiction that might be disrupted by parallel state court proceedings. *See, e.g., Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880-82 (11th Cir. 1989). Here, the district court retained jurisdiction only over payments from the settlement Fund, and "[n]othing about petitioners' Texas lawsuit affects the operation of the Fund." Pet. at 22-23. Respondents' claim that an award for petitioners in Texas would reduce the money available from the Fund for payouts to veterans (Opp. at 18, 22) ignores the Second Circuit's square holding to the contrary. *See* **A4**, **A22** ($10 million indemnification provision was to be triggered only by awards to "those plaintiffs who opted out of the class" in 1984 and would not be triggered by awards to current petitioners).

[9] It is true — as the Petition noted — that the settlement agreement negotiated by the parties in 1984 stated: "'The Class specifically includes persons who have not yet manifested injury.'" Pet. at 7 (quoting settlement).

(c) Equitable Principles and "Principles and Usages of Law." That an exception to the Anti-Injunction Act might exist, of course, does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Atlantic Coast Line R.R. Co.*, 398 U.S. at 295-96. Respondents identify no irreparable injury from litigation of their *res judicata* defense in state court. Their ability to litigate their contested *res judicata* defense in state court constitutes an adequate remedy at law,[10] and "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Moreover, as the States point out, the plain language of the All Writs Act allows only those writs (including injunctions) that are "agreeable to the principles and usages of law" that have traditionally been employed. Brief *Amici Curiae* of the State of

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That observation is hardly surprising, given the presence of many New York veterans in the case and the requirement of the New York statute of limitations that toxic tort victims must typically sue *before* they manifest any injury, *see* **A12-A13**. This descriptive statement that *some persons in the class* had not yet manifested injury in no way establishes the quite different proposition, advanced now by respondents, that *all persons who had not yet manifested injury* were in the class of persons to be bound. Respondents' expansive view of this language is contrary to the contemporaneous view of the Second Circuit that only persons who subjectively *believed* they were injured (whether or not the injury had manifested as of 1984) were class members. *See* Pet. at 5-6 & n.5. Thus, the only relevant issue concerning class membership ever litigated and decided before this case was that *some* of the persons in the class were persons who had a subjective belief that they were injured.

Petitioners, of course, made no "concession" in Pet. at 7 n.8 that they were members of the class. Rather, they expressly reserved "their contract law objections" to that conclusion, preparatory to a remand from this Court's reversal of the judgment below. It is only "for purposes of review in this Court," *id.*, that petitioners have cleared away such fact-bound issues in order to present a clean legal dispute on the second Question Presented.

[10] *See, e.g., De Cosme v. Sea Containers, Ltd.*, 874 F.2d 66, 68-69 (1st Cir. 1989) (holding that "legitimate question whether . . . res judicata . . . would apply" is "properly to be determined by the [state court]"); *Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1058-59 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) (observing that availability of injunction turns on "availability of adequate state court remedies" and refusing injunction, with reference to state court civil action for money damages, because there was "not the slightest reason . . . to doubt the ability or willingness of the state judges" to resolve the *res judicata* defense).

Texas, *et al.*, at 9 (citing *Riggs v. Johnson County*, 73 U.S. 166, 190 (1868)). Respondents do not contest that "given the long-settled practice of preclusion issues being decided by the second court, *no* exercise of power under § 1651(a) could ever be justified by the view of the courts below that the Texas courts simply cannot be trusted to adjudicate this issue properly." *Id.*

In sum, respondents' attempted rehabilitation of the decision below enhances, rather than reduces, the basis for certiorari by demonstrating that this case provides an apt vehicle for this Court to address the role state courts should play in resolving *res judicata* defenses raised in state court suits that follow class action settlements in federal court, and to make plain that the All Writs Act and Anti-Injunction Act, far from inviting circumvention of limits written by Congress into its removal statutes, *reinforce* the architecture of federalism that those statutes help to define.

3. Respondents' answer on the second Question Presented is no more reassuring. Respondents' *ad hominem* argument is absurd. According to respondents, petitioners can be dismissed simply as greedy claimants who are intent on upsetting a carefully negotiated, reasonable settlement that works to the advantage of every other Vietnam veteran. *See* Opp. at 22 (petitioners "seek individual advantage at the expense of their fellow class members"); *id.* at 30 (petitioners' case would nullify the 1984 settlement "for the many thousands of class members who have already received or will receive disbursements"). But the Second Circuit has already ruled that a recovery by petitioners would not draw money from the Fund. *See* note 8, *supra*. Moreover, respondents simply ignore the *amicus* brief filed by Admiral Zumwalt and 31 organizations that represent over eight million veterans. These organizations, which are in a much better position to evaluate the interests of Vietnam veterans than respondents, urge this Court to consider the broad due process issues raised by this case. *See* Brief *Amici Curiae* of Agent Orange Coordinating Council, *et al.*

On the substance of the second Question Presented, respondents simply pretend that petitioners advance only a fact-specific claim "that the district court erred in dismissing their claims as barred by the Settlement Agreement." Opp. at 24. In truth, petitioners have removed all fact-bound issues from this case by assuming that the parties in 1984 intended to extinguish future claims of persons not

then before the court. *See* Pet. at 7 n.8; note 9, *supra*. Thus, the second Question Presented raises only broad legal issues concerning "the procedural standards governing the conduct of class actions" in a new context, one which is of "significant and growing importance." Pet. at 25 & n.33. In noting the recurring issues in this area of "future interest" litigation, the Petition argued that this Court should pass on the acceptability of the "quasi-legislative" analysis of due process issues employed by the Second Circuit below. Rather than enter the debate at that level, respondents simply advance their views of the facts of this case. *See* Opp. at 24-30. Those arguments hardly resolve the important problems of principle in this area which this Court has never addressed. Because nothing in the Opposition renders this case ineligible for this Court's initial review of the issues, certiorari is warranted.

CONCLUSION

For all these reasons, the Petition should be granted.[11]

Respectfully submitted,

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[11] Petitioners note that the 50 States and the 31 veterans organizations have urged a grant of certiorari *only* as to the instant petition, No. 93-860. There is no *amicus* support for granting review of a separate petition, No. 93-1035, filed by other plaintiffs who lost in the Second Circuit below and who are represented by entirely separate counsel. That petition is simply a "me too" document, adding nothing of substance beyond what petitioners in this case have put before the Court. Petitioners respectfully suggest that the issues posed by the Second Circuit decision should be briefed and argued on the merits solely by the appellate counsel on the instant petition, who are most familiar with the case and who initially developed those issues (counsel in No. 93-1035 did not even appear in the district court, *see* **A44**). Moreover, unlike petitioners in No. 93-1035, *see* Opp. at 6; **A45**, present petitioners have received no payments from the settlement Fund. Petitioners therefore urge that merits review be granted only on the instant petition.

APPENDIX

Excerpt from Brief *Amici Curiae* of the States of Alabama, Arkansas, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, South Dakota, Texas, Utah, West Virginia, Vermont; and the Commonwealth of Massachusetts, in Support of Appellants, filed in *Ivy v. Diamond Shamrock Chemicals Co.*, 2d Cir. No. 92-7575, dated Sept. 16, 1992, pp. 11-15.

II. THE DECISION BELOW CANNOT BE JUSTIFIED AS MERE ENFORCEMENT OF THE DISTRICT COURT'S PRIOR INJUNCTION BECAUSE PLAINTIFFS HAVE NOT VIOLATED ANY SUCH INJUNCTION.

In addition to defending its removal jurisdiction, the district court also held that "a new and independent basis for subject matter jurisdiction is not necessary for the court to rule on the merits of plaintiffs' claims" because, "[b]y barring 'each and every plaintiff and member of the . . . class . . . from instituting or maintaining any action against any of the defendants,' 618 F. Supp. at 624, the court effectively issued an injunction which bars the current actions." 781 F. Supp. at 916 (ellipses in original) (quoting from ¶ 5 of the Final Judgment in the *Agent Orange Litigation*). The court then asserted continuing jurisdiction to enforce what it now labels an "injunction." *Id.*

An injunction to prevent relitigation of issues in a state court must be carefully and narrowly construed in order to pass muster under the Anti-Injunction Act, 28 U.S.C. § 2283. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 144, 148 (1988) (reversing a federal injunction preventing a plaintiff "'from seeking to relitigate in any state forum the issues finally decided' in the federal court's [prior] dismissal"). Accordingly, the federal court's recitation that the settling claimants are "barred" from relitigating their claims by ¶ 5 of the Order and Final

Judgment of Dismissal — which the court assumed to be a superficially broad injunction — must be read in light of the Order's express provision that the Order was intended to implement the previously approved Settlement Agreement, *Agent Orange Litigation*, 618 F. Supp. at 624, and in light of ¶ 2 of the Order, which provides that the "Settlement Agreement shall be consummated in accordance with its terms." *Id.* Paragraph 6 of the Settlement Agreement makes clear that state court, as opposed to federal, tort actions by future claimants are still possible and are in fact anticipated:

> The Fund shall indemnify all defendants . . . for all final compensatory judgments . . . rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange . . . not to exceed an aggregate amount of $10 million.

Agent Orange Litigation, 597 F. Supp. 740, 864 (E.D.N.Y. 1984). The district court subsequently confirmed that the Settlement Agreement expressly contemplates state court actions such as those at issue here:

> [A] sum of $10 million must, in accordance with the settlement agreement, be placed in reserve for a period of twenty-five years from the date of the settlement. . . . Under the terms of the Settlement Agreement, *this reserve will be used to cover possible claims in state courts. It will be available to compensate injured Vietnam veterans exposed to Agent Orange, should future evidence indicate a legally cognizable link between Agent Orange exposure and specific ailments.* While it is unlikely that claims will be viable in state courts in view of the court of appeals' holding that there is no basis for the claims, this sum will be invested in reserve against that possibility.

Agent Orange Litigation, 689 F. Supp. 1250, 1259-60 (E.D.N.Y.

1988) (emphasis added).[1]

It is beyond cavil that, when read in their entirety, the Settlement Agreement and the district court's orders implementing it (1) expressly contemplated "claims in state courts" such as those plaintiffs have now brought in Texas, and (2) provided a special, segregated fund to assure indemnification of any damages that might be awarded by the state courts, although it was at the time deemed unlikely that any future plaintiff could overcome the evidentiary and causation hurdles which had led to the dismissal of all claims then pending in federal court. Because these suits were, by the district court's own *contemporaneous* interpretation, expressly contemplated and provided for in the Settlement Agreement and accompanying court orders, the district court cannot now insist that these suits are enjoined by the more vaguely worded "bar" mentioned in the Final Judgment implementing and incorporating that Settlement Agreement. Although an appellate court should "take careful account of the explanatory opinion issued by the district judge at the time the decree was entered," *United States v. Western Electric Co.*, 900 F.2d 283, 294 n.10 (D.C. Cir.), *cert. denied*, 111 S. Ct. 283 (1990), this Court should "reject [any] suggestion" that Judge Weinstein's subsequent reinterpretations of the decree "should be afforded some 'special' deference," even if he had some part in "draft[ing] the pivotal provision" and even if he "has had enormous experience overseeing the case and the decree since its inception." *Id.* at 294.[2]

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[1] Even now, while asserting in one place that plaintiffs' state court suits are barred by its injunction, the court below elsewhere confirms that from the outset it anticipated "suits of this kind," 781 F. Supp. at 912, and that its Settlement Agreement therefore provides a mechanism for indemnifying defendants "from any judgments obtained in state court actions by members of the class." *Id.* at 908.

[2] In similar circumstances, the D.C. Circuit refused to defer to Judge Harold H. Greene's subsequent interpretations of a consent decree provision that he himself had drafted in the case that broke up the Bell System, despite Judge Greene's decade of intensive experience with that

Agreements that end lawsuits are contracts that the court is not free to expand, constrict or otherwise rewrite retroactively. *Janus Films, Inc. v. Miller*, 801 F.2d 578, 583 (2d Cir. 1986); *Artvale Inc. v. Rugby Fabrics Corp.*, 303 F.2d 283 (2d Cir. 1962). Nor is the district court free to reinterpret the scope of the alleged injunction it previously issued to implement that agreement. As the Supreme Court recently (and unanimously) reaffirmed, the scope of an injunction permissible under § 2283 depends upon the "precise state of the record and what the earlier federal order *actually* said; it [does] not permit the District Court to render a *post hoc* judgment as to what the order was *intended* to say." *Chick Kam Choo*, 486 U.S. at 148 (emphasis in original). The district court's revisionism is out of order and must be rejected.

Because state court suits of this kind were expressly provided for by the Agent Orange judgment, plaintiffs did not violate that judgment by bringing suit in the Texas courts. Defendants are still free to raise their *res judicata* defense in the courts of Texas, of course, but the court below was without subject matter jurisdiction to consider it. The district court's refusal to enforce, or even acknowledge, the Anti-Injunction Act breaches an important bulwark of federalism.

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enormously complicated case. *See United States v. Western Elec. Co.*, 900 F.2d at 293-94.